Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE
Supreme Court of the United States
October Term, 1978

Nos. 78-1088 and 78-1217

HENRY A. KISSINGER,
Petitioner,

v.

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, *et al.*,
Respondents.

and

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, *et al.*,
Petitioners,

v.

HENRY A. KISSINGER,
Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitions For Certiorari filed January 8, 1979 and February 5, 1979

Certiorari granted April 16, 1979

IN THE

Supreme Court of the United States

October Term, 1978

Nos. 78-1088 and 78-1217

HENRY A. KISSINGER,

Petitioner,

v.

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, *et al.*,

Respondents.

and

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, *et al.*,

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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LIST OF RELEVANT DOCKET ENTRIES

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 77-0220

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, et al., Plaintiffs

v.

CYRUS R. VANCE, et al., Defendants

Date	Nr.	Proceedings
1977		
Feb. 08		COMPLAINT; exhibits A, B, C, D, E, F, G; appearance.
Mar 21		AMENDED complaint by pltf; Exhibits A thru I; c/m 3-21-77.
Apr 19		ANSWER of defts Vance and Boorstin to amended complaint; c/m 4-19-77; Appearance of Jeffrey Axelrad.
Apr 19		ANSWER of deft Henry A. Kissinger to amended complaint; c/m 4-19-77. Appearances of James E. Wesner and Martha Jane Shay.
Apr 19		CALENDARED. CD/N.
Apr 19		MOTION of pltfs for summary judgment and, alternatively, a preliminary injunction; statement of material facts; P&A's; table of contents; affidavit of William E. Leuchtenburg; affidavit of Nat Hentoff; affidavit of William Safire; Exhibit A; affidavit of Donald G. Herz-

berg; appendices to memorandum of points and authorities; c/m 4-18-77. (fiat) Smith, J.

May 02 OPPOSITION of deft Kissinger to pltfs motion for a preliminary injunction; P&A's; table of contents; table of authorities; c/m 5-2-77.

May 02 OPPOSITION of defts Vance and Boorstin to pltfs motion for a preliminary injunction; affidavit of John C. Broderick; memorandum; attachment; c/m 5-2-77.

May 10 REPLY MEMORANDUM of points and authorities of pltfs in support of their motion for a preliminary injunction; table of contents; c/s 5/10/77.

May 11 SUPPLEMENT by deft #3 to opposition to plfts motion for preliminary injunction; Affidavit of Henry A. Kissinger;c/s 5-11-77.

May 12 SUPPLEMENT by defts #2 and #3 to opposition to pltfs motion for preliminary injunction; Affidavit (2nd) of John C. Broderick; Attachments A, B, C; c/s 05/12/77.

May 13 MOTION of pltf for a preliminary injunction argued and taken under advisement. (Rep: D. Copeland) Smith, J.

May 20 OPINION and Order denying pltfs motion for preliminary injunction. (N). (See Opinion for further details) Smith, J.

May 26 MOTION of defts to consolidate with 77-0391; c/s and c/m 5-25-77.

June 17 OPPOSITION by defts Vance, Boorstin & the Department of State to motions of pltfs. for summary judgment; affidavit of Jeffrey Axelrad; memorandum; c/m 6-17-77.

June 17 REQUEST by defts Vance, Boorstin & the Department of State for production of documents directed to deft Kissinger; c/m 6-17-77.

June 17 MOTION by defts Vance, Boorstin & the Department of State for a protective order; memorandum; c/m 6-17-77.

June 17 CROSS-MOTION by deft., Henry A. Kissinger for summary judgment; statement of material facts; P&A's; appendices to P&A's; second affidavit of Henry A. Kissinger w/attachment; affidavit of Monroe Leigh; c/m 6-17-77.

June 20 ORDER granting defts Vance, Boorstin and Rhoads motion to consolidate C.A. Nos. 77-220 and 77-391 for all purposes. (N). Smith, J.

Aug 05 OPPOSITION of pltfs Military Audit Project, et al. to deft #3's cross-motion for summary judgment; c/m 8-4-77.

Aug 08 MEMORANDUM of points and authorities by deft Henry A. Kissinger in response to the Government's opposition to summary judgment and in opposition to its request for production of documents pursuant to a protective order; table of contents; table of authorities; c/m 8-8-77.

Aug 08 REPLY memorandum of plfts of points and authorities in support of their motion for summary judgment, in opposition to deft Kissinger's

cross-motion for summary judgment and in opposition to the Government's request for production of documents; table of contents; c/m 8-8-77. (fiat) Corcoran, J.

Aug 09 WITHDRAWAL of motion for protective order by defts; c/m 8-9-77.

Aug 22 SUR-REPLY memorandum of points and authorities in support of pltfs motions for summary judgment and in opposition to deft Kissinger's motion for summary judgment; table of contents; c/m 8-22-77.

Aug 22 REPLY memorandum of points and authorities by deft Kissinger in support of his cross-motion for summary judgment and in opposition to pltfs motions for summary judgment; table of contents; table of authorities; Exhibit; c/m 8-22-77.

Sept 28 CROSS-MOTIONS for summary judgment argued and taken under advisement. (Rep. J. Blair) Smith, J.

Dec 08 OPINION granting pltfs motions for summary judgment and deft Kissinger's motion for summary judgment will be denied; counsel to submit appropriate order within 10 days. (N) Smith, J.

Dec 16 MOTION of pltf for clarification of opinion; P&A's; attachment; c/s 12-16-77.

Dec 19 MEMORANDUM on proposed order by pltf; c/m 12-16-77.

Dec 19 OPPOSITION by deft Henry A. Kissinger to entry of proposed order; P&A's; c/m 12-19-77.

Dec 19 MEMORANDUM of points and authorities regarding pltfs proposed order effectuating the Court's December 8 Opinion; c/m 12-16-77.

Dec 20 TRANSCRIPT OF PROCEEDINGS, September 28, 1977; courts copy; pages 1-77; (Rep: J. Blair)

Dec 22 RESPONSE of deft Kissinger to memorandum of points and authorities regarding pltfs proposed order effectuating the Court's December 8 Opinion; c/s 12-22-77.

Dec 27 REPLY OF Henry A. Kissinger to pltfs motion for clarification; Exhibit A; c/s 12-27-77.

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Jan 05 MEMORANDUM in support of Government defts proposed order; c/m 1-5-78.

Jan 09 REPLY memorandum of points and authorities in support of pltfs motion for clarification and proposed order; Exhibit A; c/s 1-9-78.

Jan 13 RESPONSE of deft Kissinger to reply memorandum in support of pltfs motion for clarification; c/m 1-13-78.

Jan 19 MEMORANDUM by deft #3 in support of proposed order; c/m 1-19-78.

Jan 25 ORDER denying in part and granting in part cross-motion of deft Kissinger for summary judgment; granting in part and denying in part motion of pltfs for summary judgment; directing that as soon as practical the defts transfer to the custody of the Dept. of State the original

transcribed secretarial notes as set forth in this order; further directing that the Dept. of State make a determination which notes are required to be released pursuant to the Freedom of Information Act, the Court retains jurisdiction; the effectiveness of this order is stayed for a period of ten days. (see order for further details) (N) Smith, J.

Feb 03 MOTION by deft Kissinger for stay; memorandum; c/m 2-3-78.

Feb 14 MILITARY audit project by pltfs and Felice D. Cohen's opposition to motion for stay; c/m 2-13-78.

Feb 15 RESPONSE by Government defts to deft Kissinger's motion for a stay; c/m 2-78.

Feb 16 OPPOSITION by pltf to deft Kissinger's motion for a stay pending appeal; P&A's; affidavit of William E. Leuchtenburg; affidavit of William Safire; affidavit of Dr. Mack Thompson; affidavit of Nat Hentoff; affidavit of Evron M. Kirkpatrick; affidavit of Donald G. Herzberg; affidavit of Jeremiah A. O'Leary; affidavit of Richard Dudman; affidavit of Hedrick Smith; c/m 2-15-78.

Feb 21 RESPONSE to pltfs oppositions to deft Kissinger's motion for a stay pending appeal; c/m 2-21-78.

Feb 24 NOTICE of appeal by deft Kissinger from Order of 1-25-78. $5.00 paid and credited to U.S. Copy of notice of appeal mailed to Robert M. Sussman, Barbara Ward and William Dobrovir.

Feb 28 NOTICE of appeal by pltfs from order of 1-25-78. $5.00 paid and credited to U.S. Copies mailed to James Wesner, Barbara Ward and William Dobrovir.

Mar 01 MOTION of deft Kissinger to Stay pending appeal GRANTED IN PART. (OTBP) Smith, J.

Mar 02 ORDER paragraphs 7 and 8 of the Final Order entered on Jan. 25, 1978 is hereby stayed and suspended pending a final determination of the merits on appeal and it is further ordered that deft Kissinger shall have access to the notes to the extent permitted by established State Dept. regulations and policies. (N) Smith, J.

Mar 07 PRELIMINARY record on appeal delivered to USCA; Receipt acknowledged. (USCA #78-1207)

Mar 09 TRANSCRIPT OF PROCEEDINGS, March 1, 1978; courts copy; pages 1-34; (Rep: D. Copeland)

Apr 07 RECORD on appeal delivered to USCA; Receipt acknowledged 4-10-78. (USCA #78-1315)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 77-0391

MILITARY AUDIT PROJECT, et al., Plaintiffs

v.

DEPARTMENT OF STATE, et al., Defendants

Date	Nr.	Proceedings
1977		
Mar 08		COMPLAINT; appearance.
Apr 18		MOTION of pltfs for summary judgment; statement of material facts; memorandum of P&A; exhibits (14); c/m 4-14-77.
Apr 26		ANSWER of deft #2 to complaint; appearance; c/m 4-26-77.
Apr 26		ANSWER of defts #1, 3 & 4 to complaint; appearnce; c/m 4-26-77.
Apr 26		CALENDARED. CD/N
May 26		MOTION of defts Vance, Boorstin & Rhoads to consolidate CA 77-0220 & CA 77-0391; c/m 5-25-77.
June 21		COPY of order filed 6-20-77 granting defts Vance, Boorstin & Rhoads motion to consolidate CA 77-220 & 77-391 for all purposes. (N) (Original filed in CA 77-220). SMITH, J.

LIST OF RELEVANT DOCKET ENTRIES
IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1207

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, et al.

v.

CYRUS R. VANCE, individually and as Secretary of State, et al.,

HENRY A. KISSINGER, Appellant

No. Below: Civil Action 77-0220
Judge Below: John Lewis Smith, Jr.
Date of Judgment: January 25, 1978
Notice of Appeal Filed: February 24, 1978

Date	Filings — Proceedings	Filed
(A) 3-7-78	Certified Original Preliminary Record (no transcripts) (n-4) 4-21	
(A) 3-10-78	4-Appellant's motion to consolidate with No. 78-1208 (p-10)	
(A) 3-10-78	4-Appellant's motion for stay (p-10)	
(T) 3-16-78	4-Appellees (Military Audit Project) opposition to motion for stay (m-15)	
(E) 3-17-73	Clerk's order granting Appellant's motion to consolidate with No. 78-1208	

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1208

MILITARY AUDIT PROJECT, et al.

v.

DEPARTMENT OF STATE, et al.,

HENRY A. KISSINGER, Appellant

No. Below: Civil Action 77-0391
Judge Below: John Lewis Smith, Jr.
Date of Judgment: January 25, 1978
Notice of Appeal Filed: February 24, 1978

Date	Filings — Proceedings	Filed
(A) 3-7-78	Certified Original Preliminary Record (no transcripts) (n-4) 4-21	
(A) 3-10-78	4-Appellant's motion to consolidate with No. 78-1207 (p-10)	
(A) 3-10-78	4-Appellant's motion for stay (p-10)	
(T) 3-16-78	4-Appellees' (Military Audit Project, et al) opposition to motion for stay (m-15)	
(E) 3-17-78	Clerk's order granting appellant's motion to consolidate with No. 78-1207	
(A) 3-17-78	4-Appellee's (Dept. of State) response to appellant's motion for a stay (m-17)	

(A) 3-17-78	4-Appellees' (Reporters Committee for Freedom of the Press, et al.) opposition to appellant's motion for a stay (p-17)	
(A) 3-22-78	4-Appellant's response to oppositions to motion for stay pending appeal (m-22)	
(A) 3-23-78	Certified Original Record (2 vols.) (no transcripts) (n-4)	
(E) 4-3-78	Per Curiam order denying the motion for stay pending appeal and that the defendant Kissinger shall have access to the notes to the extent permitted by established State Department regulations and policies (See order for details) CJ Wright and Fahy, Senior CJ	
(C) 4-11-78	4-Appellant's motion to consolidate with No. 78-1315 and for a briefing schedule (m-11)	
(A) 4-19-78	Order per CJ Wright directing Clerk to schedule case nos. 78-1207, 78-1208 & 78-1315 argument on the merits as promptly after the briefs of the parties have been filed as the business of the Court permits, and that no. 78-1315 is consolidated with nos. 78-1207 & 78-1208 for consideration on the merits; and that a briefing schedule is set as follows: . . . and that the parties are directed to address in their briefs, among any other matters counsel be so advised, the questions: (1) whether the January 25, 1978 order of the District Court is appealable as either a final or an interlocutory decision pursuant to 28 U.S.C. Sec. 1291 and 1292 (a) (1); (2) if it is an appealable interlocutory decision, the scope of the Court's review	

(A) 4-24-78 15-Appellant's brief (p-24)

(A) 4-24-78 3-Appellant's appendix of statutes and regulations (p-24)

(A) 4-24-78 7-Joint appendix (p-24)

(A) 4-25-78 1-Copy of letter from Clerk, Supreme Court that application for stay of the order is granted pending final disposition of this court in SC No. A-856 on April 24, 1978

(A) 5-24-78 15-Appellees' (Military Audit Project, et al.) brief (m-24)

(A) 5-24-78 25-Appellees' (Reporter's Committee, etc., et al.) brief (m-24)

(T) 6-29-78 15-Brief of the United States as amicus curiae (m-29)

(T) 7-13-78 4-Letter from counsel for the United States advising of additional authorities pursuant to Local Rule 8(g)

(C) 7-17-78 25-Reply brief of Reporters Committee in response to US amicus brief (m-17) & (m-3)

(T) 7-17-78 4-Appellee's (Military Audit Project) memorandum in response to the brief of the United States as amicus curiae (m-14)

(C) 7-26-78 Order per CJ Wright that the Clerk is directed to schedule 77-2123, 77-2124 & 77-2125 and 78-1207, 78-1208 & 78-1315 on the same day and before the same panel.

(C) 8-8-78 15-Appellant's (Kissinger) reply brief (p-4)

(C) 8-29-78 4-Motion of United States for leave to lodge a document with the Court in connection with this case (m-29)

(E) 9-18-78 Clerk's order granting the motion of US for leave to lodge 15 copies of a letter of June 28th from Jay Solomon to Dr. Henry A. Kissinger

(E) 9-18-78 15-Letter of June 28th from Jay Solomon to Dr. Henry A. Kissinger

(T) 10-16-78 4-Motion of Military Audit Project for leave to file material as appendix to brief (m-13)

(E) 10-19-78 Clerk's order granting appellee's motion for leave to file appendix

(E) 10-31-78 Argued before CJ Wright*, Lumbard, US CJ for the Second Circuit and Tamm, CJ

(T) 11-3-78 4-Letter from counsel for Reporters Committee, et al. advising of additional authorities pursuant to Local Rule 8(g)

(R) 11-7-78 Judgment affirming judgment of the District Court, for the reasons set forth in the attached memorandum (n)

(T) 11-14-78 1-Appellees' (Military Audit Project) bill of costs (m-13)

(T) 11-22-78 4-Appellant's motion for stay of mandate pending application for writ of certiorari (p-22)

(T) 11-28-78	4-Appellee's (Reporters Committee) opposition to appellant's motion for stay of mandate (p-28)
(T) 11-29-78	4-Appellant's reply to appellee's opposition to appellant's motion for stay of mandate (m-29)
(D) 12-1-78	4-Appellee's (Military Audit) motion for leave to file response to motion for stay of mandate time having expired (m-30)
(E) 12-14-78	Clerk's order granting appellee's motion for leave to file response to motion for stay of mandate, time having expired
(E) 12-14-78	4-Appellee's response to motion for stay of mandate (m-29)
(E) 12-20-78	Per Curiam order granting the motion for stay of mandate and the Clerk is directed not to issue the mandate prior to January 9, 1979; CJ Wright, Lumbard, Senior CJ for the USA for 2nd Cir. and Tamm, CJ
(T) 1-9-79	Certified copy of order from Clerk, Supreme Court that a petition for writ of certiorari was filed in SC No. 78-1088 on January 8, 1979 and is now pending
(T) 1-10-79	Notice from Clerk, Supreme Court that a petition for writ of certiorari was filed SC No. 78-1088 on January 8, 1979
(T) 2-7-79	Notice from Clerk, Supreme Court that a petition for writ of certiorari was filed SC No. 78-1217 on February 5, 1979

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1315

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, et al., Appellants,

v.

CYRUS R. VANCE, individually and as Secretary of State, et al.

No. Below: Civil Action 77-0220
Judge Below: John Lewis Smith, Jr.
Date of Judgment: January 25, 1978
Notice of Appeal Filed: February 28, 1978

Date	Filings — Proceedings	Filed
(A) 4-7-78	Certified Original Record (1 vol. transcript) (2 vols. record) (n-4)	
(A) 4-19-78	Order per CJ Wright directing Clerk to schedule case nos. 78-1207, 78-1208 & 78-1315 argument on the merits as promptly after the briefs of the parties have been filed as the business of the Court permits, and that nos. 78-1315 is consolidated with nos. 78-1207 & 78-1208 for consideration on the merits; and that a briefing schedule is set as follows: . . . and that the parties are directed to address in their briefs, among any other matters counsel be so advised, the questions: (1) whether the January 25, 1978 order of the	

District Court is appealable as either a final or an interlocutory decision pursuant to 28 U.S.C. Sec. 1291 and 1292 (a)(1); (2) if it is an appealable interlocutory decision, the scope of the Court's review.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MILITARY AUDIT PROJECT FELICE D. COHEN, Director Military Audit Project Plaintiffs v. DEPARTMENT OF STATE HENRY A. KISSINGER DANIEL J. BOORSTIN Librarian of Congress JAMES B. RHOADS Archivist of the United States Defendants [Addresses of parties omitted in printing]	)	Civil Action No. 77-0391

COMPLAINT FOR ACCESS TO RECORDS

1. This is an action under the Freedom of Information Act for access to records of the Department of State, which defendant Henry A. Kissinger claims are personal records and which he has deposited with the defendant Librarian of Congress with prohibition of access by anyone except himself and his designees.

2. This court has jurisdiction pursuant to 5 U.S.C. § 552 (a)(4)(B).

3. On December 28, 1976, plaintiffs requested from defendant Department of State access, under the Freedom of Information Act, to the records of conversations of the Secretary of State, Henry A. Kissinger, with foreign heads of state, heads of government, ambassadors, foreign ministers and national security advisers ("the records"). Plaintiffs made a second request on December 29, 1976, for records of conversations of the Secretary of State with anyone.

4. By letter dated January 18, 1977, the Department of State denied the requests on the ground that the records requested were "personal" and "are not and never have been agency records of the Department of State." Plaintiffs appealed the denial. The appeal was denied on March 4, 1977. Plaintiffs have exhausted their administrative remedies.

5. Plaintiffs are persons within the meaning of the Freedom of Information Act.

6. Defendant Department of State is an agency within the meaning of the Freedom of Information Act and is the lawful custodian of the records. Defendant Henry A. Kissinger was Secretary of State until January 20, 1977, has asserted that the records are and in violation of law has treated the records as his personal property. Defendant Daniel J. Boorstin is the Librarian of Congress who, in violation of law, has accepted a physical deposit of the records in the Library. Defendant James B. Rhoads is the Archivist of the United States and has asserted jurisdiction over the records.

7. On November 11, 1976, the Legal Adviser of defendant Department of State, Monroe Leigh, Esq., stated in a memorandum to defendant Henry A. Kissinger that the records had been reviewed by the Department of State Council on Classification Policy "and found that they did *not* contain classified information" (emphasis in original).

8. The records are records of the Department of State, an agency of the United States within the meaning of 5 U.S.C. § 552, 18 U.S.C. § 641 and 44 U.S.C. §§ 3101-07, 3301-14, as implemented in regulations of the Department of State, §§ 411, 412, 417, 423, 432 and 436 of the Foreign Affairs Manual and regulations of the General Services Administration, GSA Bulletin FPMR B-65, ¶ 4(c), 41 Fed. Reg. 51149 (November 19, 1976).

9. On a date unknown, defendant Henry A. Kissinger, in violation of the provisions of law and regulations specified in paragraph 8, removed the records from the Department of State and placed them on private property in the State of New York.

10. On or about December 24, 1976, defendants Henry A. Kissinger and Daniel J. Boorstin executed a purported donation of the records to the Library of Congress, which purports to prevent access to the records by the public and all persons other than defendant Henry A. Kissinger for 25 years or five years after the death of Henry A. Kissinger, whichever is later, with unrestricted use only by Henry A. Kissinger and persons named or approved by him. Plaintiffs are informed and believe that defendant Henry A. Kissinger intends to publish the records, portions thereof or references thereto or to their contents, for his private profit, in violation of law.

11. Plaintiffs are informed and believe that on or about December 28, 1976, defendant Henry A. Kissinger, in violation of the provisions of law and regulations specified in paragraph 8, physically placed the records in the Library of Congress pursuant to the purported donation described in paragraph 10.

12. On January 4, 1977, defendant James B. Rhoads requested access to the records to determine whether they are in whole or in part records within the meaning of applicable laws and regulations. On January 18, 1977, defen-

dants Department of State and Kissinger denied the request.

13. By the acts described in paragraphs 9-12, *supra*, defendant Kissinger unlawfully converted valuable property of the United States, to wit, agency records of the Department of State, to his own use, thereby depriving plaintiffs of rights of access secured to them by the Freedom of Information Act, 5 U.S.C. § 552.

14. Plaintiffs request that this court

(a) grant plaintiffs access to the records and enjoin defendants from withholding the records;

(b) declare unlawful the removal of the records from the Department of State, their purported donation to the Library of Congress and their physical transfer to the Library of Congress;

(c) declare unlawful the restrictions on access to the records described in paragraph 10 and any other restrictions on public access save those provided in the Freedom of Information Act, 5 U.S.C. § 552(b)(1)-(9);

(d) align defendant Rhoads as a plaintiff pursuant to Rule 19(a), F.R.Civ.P.;

(e) award plaintiffs their costs, expenses and attorneys' fees pursuant to 5 U.S.C. § 552(a)(4)(E).

/s/ William A. Dobrovir
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March 8, 1977

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

The Reporters Committee for Freedom of the Press American Historical Association American Political Science Association James MacGregor Burns Nat Hentoff Donald G. Herzberg William Leuchtenburg Arthur Link J. Anthony Lukas Austin Ranney Clement E. Vose William Safire Plaintiffs vs. Cyrus R. Vance, individually and as Secretary of State	No. 77-0220

Daniel J. Boorstin, individually and as Librarian of Congress

Henry A. Kissinger

Defendants.

[Addresses of parties omitted in printing]

AMENDED COMPLAINT

Plaintiffs, for their amended complaint herein, allege as follows:

I. NATURE OF THE ACTION

1. This is a civil action for declaratory, injunctive and mandamus relief. Plaintiffs sue as individuals engaged in the professions of education, journalism, history and political science, as organizations of such individuals, and as individual citizens and taxpayers. They seek review of the Department of State's denial of their Freedom of Information Act request for the transcribed secretarial notes of the telephone conversations held by defendant Henry Kissinger during his service as Assistant to the President for National Security Affairs and Secretary of State. These notes are now in the process of being transferred to the Library of Congress pursuant to two unlawful agreements between defendants Kissinger and Boorstin that will deny the public access to them, except on such terms as defendant Kissinger determines, for twenty-five years or five years after the death of defendant Kissinger or the other parties to the conversation, whichever occurs later. Plaintiffs assert that these notes — which reflect official conversations, were prepared and edited by government em-

ployees, stored in government facilities and used by other government employees as part of their duties — have always been the property of the Department of State, and thus could not lawfully be disposed of by defendant Kissinger pursuant to private agreement. But for the unlawful agreements between defendants Kissinger and Boorstin, these historic documents would now be available for use, study and inspection by the Government and by private citizens seeking disclosure according to the established standards and procedures of the Freedom of Information Act.

This action seeks to prevent defendants Kissinger and Boorstin from effectuating the unlawful agreement transferring the notes to the Library of Congress and denying the public access thereto; to compel the Department of State, as their lawful owner, to regain custody of these notes; and to provide for an orderly examination of the notes and their release to plaintiffs and others on the basis of the standards for disclosure established by and under the Freedom of Information Act.

II. JURISDICTION AND VENUE

2. Jurisdiction is conferred on this Court by the Freedom of Information Act, 5 U.S.C. § 552, by the Administrative Procedure Act, 5 U.S.C. §§ 702-04 and by 28 U.S.C. § 1331 (federal question), § 1361 (action to compel federal officer to perform duty), and §§ 2201 and 2202 (declaratory judgment). The amount in controversy, exclusive of interest and costs, exceeds in monetary value the sum of $10,000. A substantial portion, if not all, of the documents at issue in this action are now located within the District of Columbia, in the custody of defendants Boorstin or Kissinger, and many of the pertinent acts, occurrences and omissions (including the denial of plaintiffs' Freedom of Information Act request) transpired within the District of Columbia.

Defendants are all found within, and are subject to service of process in, the District of Columbia.

III. DESCRIPTION OF THE PARTIES

3. The Reporters Committee for Freedom of the Press, founded in 1970, is the only organization in the nation exclusively devoted to protecting the First Amendment and freedom of information interests of the working press of all media. The Committee publishes a Press Censorship Newsletter, which is a compendium of all current governmental actions affecting the news media; it maintains a News Media Law Information Center and Press Law Citation Service; it conducts in-depth research projects on various First Amendment problems; and it assists reporters pursuing freedom of information claims.

4. Plaintiff American Historical Association is a membership organization composed of approximately 18,000 members who are engaged primarily in the teaching, study and writing of history. It was founded in 1884, and chartered by Congress in 1889, for the purpose of "the promotion of historical studies, the collection and preservation of historical manuscripts, and for kindred purposes in the interest of American history . . . ." The constitution of the Association mandates that it "encourage the collection and preservation of historical documents," "insure equal access to information," and "foster the dissemination of information about historical records and research." The Association publishes the *American Historical Review* and sponsors lectures, conventions and symposia where its members report and discuss their research, based on their study of original documents and other historical materials.

5. The American Political Science Association, founded in 1903, is the major professional organization in the United States devoted to research and education about the art and science of politics and government. Most of its approximately 17,000 members are political scientists teaching in colleges and universities. Its membership also includes graduate students, lawyers, journalists, federal, state and local government officials and elected political representatives. One of the principal activities of the Association is facilitating the dissemination of scholarly information of interest to those engaged in the study of political science. Toward this end, the Association publishes two quarterly journals, *The American Political Science Review* and *PS*.

6. Plaintiff James MacGregor Burns is Woodrow Wilson Professor of Political Science at Williams College and President-elect of the American Political Science Association. Plaintiff Burns has been and is engaged in a continuing study of political leadership and the Presidency. He has studied Presidential papers of several administrations. He has done research into the Presidency of Richard Nixon and intends to do further work on that subject. He is the author of several books on the Presidency and the recipient of various awards including the Pulitzer Prize in History, the National Book Award and the Francis Parkman Prize. He is co-author of a textbook entitled *Government By The People* concerning American political institutions. Said textbook is revised periodically, and plaintiff Burns is under contract with the publisher, Prentice-Hall, Inc., to supply further timely revised editions dealing with events subsequent to those covered in present editions. In order to continue his work, it is necessary that plaintiff Burns have access to the secretarial notes at issue in this action.

7. Plaintiff Nat Hentoff is a member of the Steering Committee of The Reporters Committee for Freedom of the Press. He is a staff writer for the *New Yorker Magazine*, a columnist for the *Village Voice*, and the author of a number of books on public affairs. Plaintiff Hentoff frequently writes on current public affairs and governmental problems

and has written and will continue to write about those aspects of the Nixon Administration, including the activities of the Department of State and the conduct of American foreign policy, which he believes have affected, or might in the future affect, civil liberties and civil rights.

8. Plaintiff Donald G. Herzberg is Dean of the Graduate School of Georgetown University and Professor of Government. He is the former Director of the Eagleton Institute of Politics of Rutgers University and was Executive Director of the Presidential Commission on Registration and Voting Participation. Plaintiff Herzberg has published works in the area of American government and politics, on political parties, political campaigning, elections, registration and voting and executive-legislative relations. In order to continue his scholarly pursuits of teaching and publishing, it is necessary for plaintiff Herzberg to be able to study the transcribed notes of defendant Kissinger's telephone conversations that are the subject of this litigation.

9. Plaintiff William Leuchtenburg is DeWitt Clinton Professor of American History at Columbia University. He has done research in presidential archives at the Franklin D. Roosevelt and John F. Kennedy libraries; has written books and articles on recent American history; and is now writing the final volume of the *Oxford History of the United States*, covering the period 1945-1977, which embraces the Nixon Presidency. Oxford University Press has contracted to publish this volume. Plaintiff Leuchtenburg has also contracted with Oxford University Press for a major revision of the *Growth of the American Republic*, which will include the Nixon Presidency. Plaintiff Leuchtenburg is author of *A Troubled Feast*, published by Little, Brown & Co., which covers the first Nixon term, and which plaintiff Leuchtenburg will soon revise to cover the period of the second administration. Plaintiff's ability to continue his research and writing about the Nixon years will be substantially affected if he is denied access to the important

transcribed notes of conversations at issue in this action.

10. Plaintiff Arthur Link is Edwards Professor of American History at Princeton University and Director of the Woodrow Wilson Papers there. He is engaged in a continuing study of 20th Century American history and conducts a course in 20th Century American history. He has worked extensively in the collections of papers of recent American presidents and plans to do such work and study in connection with the papers and other records of the Nixon Administration. He is the author of a textbook entitled *American Epoch*. Said textbook is in its fourth edition. Plaintiff Link intends to do revised editions in the future and such revised editions are expected by the publisher, Alfred A. Knopf. The materials at issue in this case are pertinent to and necessary to the proper preparation of such revisions.

11. Plaintiff J. Anthony Lukas is a member of the Steering Committee of The Reporters Committee for Freedom of the Press. From 1962 to 1972 he was a domestic and foreign correspondent for the *New York Times*, and he currently is a freelance writer who has published articles in the *New York Times Magazine*, *Harpers*, *Esquire*, *Saturday Review* and other publications. He is a senior editor of (MORE), a national magazine on the press. He is the author of two special issues of the *New York Times Magazine* dealing with the Watergate affair. He is a Neiman Fellow and a Pulitzer Prize winner. Plaintiff Lukas is currently preparing, and may prepare in the future, articles on the Administrations of Richard M. Nixon and Gerald Ford. In order to prepare accurate, timely and scholarly works, it is essential that plaintiff Lukas examine and study the transcribed notes of defendant Kissinger's official conversations that are at issue in this action.

12. Plaintiff Austin Ranney is Professor of Political Science at the University of Wisconsin and President of the

American Political Science Association. Plaintiff Ranney is engaged in research dealing with changing American attitudes toward their national political institutions, including the growth of the feeling of political alienation from their government on the part of the citizens of the United States, and, specifically, from the institution of the Presidency during the Nixon Administration. Plaintiff Ranney's field of study includes, in addition, the legal regulation of political campaign expenses. In order to fulfill his obligations as a scholar and author, it is necessary for plaintiff Ranney to study the transcribed notes of conversations that are the subject of this litigation.

13. Plaintiff Clement E. Vose is John E. Andrus Professor of Government of Wesleyan University and Representative of the American Political Science Association to the Archives Advisory Board of the U.S. Archives and Records Service. As Professor of Government plaintiff Vose is engaged in general research in American government and politics and has a special interest in the preparation and publication of material on a continuing basis on availability and use of scholarly material in libraries and other depositories. In order to prepare effectively and publish source material publications, it is necessary for plaintiff Vose to study the transcribed notes of conversations that are the subject of this litigation.

14. Plaintiff William Safire is a columnist for the *New York Times*. From January 20, 1969 through April 1, 1973, he was an Assistant to the President in the Nixon White House. Before his government service, Mr. Safire was an author, public relations consultant and reporter. He has written a book recounting his experiences in the Nixon White House entitled *Before The Fall* and he is the author of several columns that relate to the conduct of the Government during the Nixon and Ford presidencies. In the future, plaintiff Safire plans to write again about these subjects, as well as about the ongoing activities of the Govern-

ment, and his ability to carry out these plans will be impaired if he is unable to obtain and study the transcribed notes of conversations that are the subject of this litigation.

15. All of the plaintiffs have direct, immediate and specific legal interests in assuring that the original notes of conversations at issue in this action are preserved, maintained and controlled as property of the United States Government and its citizens. As educators, journalists, historians and political scientists, plaintiffs presently desire, and in the future will desire, to study, compile, analyze, interpret and report on the telephone conversations of defendant Kissinger reflected in the transcribed notes at issue herein. All of the plaintiffs are presently being injured by the unavailability of these materials and they will be irreparably injured in the future if the agreements between defendants Kissinger and Boorstin, described below, are carried out.

16. Defendant Cyrus R. Vance is the Secretary of State. In his official capacity, defendant Vance is responsible for seeing that the Department of State meets its obligations under the Freedom of Information Act, including the obligation to reclaim and make available to the public the Department records that are the subject of this action.

17. Defendant Daniel J. Boorstin is the Librarian of Congress. In his official capacity, defendant Boorstin executed the agreements with defendant Kissinger that effect the transfer to the Library of Congress of the transcribed secretarial notes that are the subject of this action. As Librarian of Congress, defendant Boorstin is currently the custodian of portions of those notes.

18. Defendant Henry A. Kissinger was Assistant to the President for National Security Affairs from approximately January 20, 1969 until approximately August, 1973. From that time until on or about January 20, 1977, defendant Kissinger was Secretary of State. The documents at issue in

this action are the secretarial notes of defendant Kissinger's telephone conversations during the time he held these positions. Defendant Kissinger is one of the parties to the agreements pursuant to which the notes were transferred to the Library of Congress, and he and his designees now have custody of portions of those notes.

IV. NATURE OF THE SECRETARIAL NOTES

19. On information and belief, substantially all of the telephone conversations of defendant Kissinger concerning official matters were monitored or recorded while he served as Assistant to the President for National Security Affairs and Secretary of State.

20. On information and belief, verbatim transcripts of these conversations, or secretarial notes that reflected their contents substantially verbatim, were prepared after the conversations occurred.

21. On information and belief, these transcripts or notes (both hereinafter referred to as "secretarial notes") were prepared by Government employees in the discharge of their official duties, on government time and with the aid of equipment, materials, office space and other services of the United States.

22. On information and belief, the secretarial notes of defendant Kissinger's conversations were retained in the normal course of Government business and stored in Government files.

23. On information and belief, the secretarial notes reflect the decisions, policies, deliberations, analyses, actions and contemplated actions in which defendant Kissinger and numerous other government employees participated in the course of discharging their official duties.

24. On information and belief, the secretarial notes were used as a record of official communications that could help

defendant Kissinger recall prior conversations and events and insure appropriate administrative follow-up.

25. On information and belief, the secretarial notes were reviewed by defendant Kissinger and his subordinates for these purposes while they performed Government business.

26. On information and belief, the secretarial notes pertain, in whole or in part, to the ongoing affairs of the United States and are essential to the orderly maintenance of the established policies of the Government and to the ongoing deliberations, analyses and decisions that the Government is now conducting.

27. As documents prepared by and for Government employees as part of the ongoing governmental process, the secretarial notes have always been the property of the Department of State, not of defendant Kissinger as a private ciizen, and constitute "agency records" within the meaning of the Freedom of Information Act, 5 U.S.C. § 552.

28. Under the statutes and established policies of the United States, including the Freedom of Information Act and the Federal Records Act, the officers, employees and agents of the United States are required to preserve the secretarial notes and, subject only to those exceptions provided by law, to make such notes available to the citizens of the United States, including plaintiffs, for purposes of inspection, study and reporting.

29. As journalists, historians, educators and political scientists, plaintiffs are an inherent part of the ongoing political process. This process depends on continuing and informed analysis, interpretation, and debate concerning issues of public interest and importance. Plaintiffs cannot perform this function if they are denied access to the notes of official conversations and other materials that reflect or relate to the policies, decisions and deliberations of the Government.

V. THE AGREEMENTS BETWEEN DEFENDANTS KISSINGER AND BOORSTIN

30. On November 12, 1976, defendants Kissinger and Boorstin entered into a Deed of Gift and Agreement (hereinafter the "First Agreement"). Under this Agreement, a copy of which is annexed hereto as Exhibit A, defendant Kissinger, acting as a private citizen, donated to the United States as a gift a collection of personal and governmental papers in his possession. Under paragraph 3 of the First Agreement, defendant Kissinger undertook to deliver both sets of documents to the Library of Congress within three months of the Agreement's execution.

31. Paragraph 4 of the First Agreement provides that personal papers donated to the Library will not be available to public access until 25 years after the date of the Agreement or five years after the death of defendant Kissinger, whichever is later. Under paragraph 5 of the Agreement, public access to government papers donated to the Library will be unavailable for the same period and, thereafter, will be allowed only if the originating agency of the papers in question has determined that they contain no classified or restricted information.

32. Until public access is permissible pursuant to paragraph 4, examination of papers subject to the First Agreement is limited by paragraph 5 to: (a) employees of the Library of Congress that have been jointly approved by the Librarian of Congress and defendant Kissinger; (b) persons who have received the written permission of defendant Kissinger; and (c) after defendant Kissinger's death, persons who have received the written permission of a committee to be named in defendant Kissinger's will.

33. Under paragraph 6, defendant Kissinger is permitted unrestricted access to all papers covered by the Agreement during his lifetime. The Library of Congress is required to provide defendant Kissinger with working space where he

can use the papers, and to permit examination of the papers by all research assistants of defendant Kissinger who have appropriate security clearances.

34. On November 11, 1976, Monroe Leigh, Esquire, then the Legal Adviser of the Department of State, wrote a memorandum to defendant Kissinger which considered whether the secretarial notes of defendant Kissinger's telephone conversations were the property of the Department of State, or instead were personal papers which defendant Kissinger could retain when he left office. The memorandum, a copy of which is annexed hereto as Exhibit B, concluded that the notes were not agency records but personal papers and therefore were the private property of defendant Kissinger.

35. On December 24, 1976, defendants Kissinger and Boorstin entered into a Second Deed of Gift And Agreement (hereinafter "Second Agreement"). Under this Agreement, a copy of which is annexed hereto as Exhibit C, defendant Kissinger donated to the Library of Congress the "transcribed secretarial notes of his telephone conversations." The Second Agreement incorporates by reference all the terms and conditions of the first Agreement of November 12, 1976 and further provides that public access to the notes will be permitted only with the consent, or upon the death, of the other parties to the telephone conversation in question. Thus, except when defendant Kissinger decides to release them to the public or to selected individuals, the notes of his telephone conversations will become available to interested persons such as plaintiffs only after this further condition has been met *and* after the passage of twenty-five years or five years from defendant Kissinger's death, whichever is later.

36. While the Second Agreement vests nominal title to the secretarial notes in the Library of Congress, the prerogatives and incidents of ownership remain with defendant Kissinger, and the notes are effectively still held as his

private property.

37. The Second Agreement would allow a private citizen, defendant Kissinger, to draw a curtain of secrecy over important policies, decisions and deliberations of the United States Government from January 20, 1969 through January 20, 1977.

38. The Second Agreement is void, and of no force and effect, for the following reasons, among others:

(a) The secretarial notes of defendant Kissinger's official conversations have always been the property of the Department of State, not of defendant Kissinger as a private citizen, and therefore could neither be transferred, donated or otherwise disposed of by a private citizen;

(b) The secretarial notes of defendant Kissinger's official conversations are "agency records" within the meaning of the Freedom of Information Act, 5 U.S.C. § 552 and enforcement of the terms of the Second Agreement would therefore deprive plaintiffs and others of their right to be informed of, and to have access to, the decisions, policies and deliberations of the Government as provided by that Act;

(c) The Second Agreement would deny plaintiffs access to and use of information concerning government policies, decisions and deliberations equal to the access available to defendant Kissinger and his designess and thus violates the First and Fifth Amendments to the United States Constitution;

(d) The Second Agreement violates the requirements of 44 U.S.C. §§ 3301-14, which establish strict and exclusive procedures for the disposal of records of the Government and which provide that records having "administrative, legal, research, or other value" should be retained;

(e) The Second Agreement violates Article IV, Section 3 of the Constitution, which provides that officers and employees of the United States lack the power and authority to dispose of or transfer property of the United States except

as authorized by rules and regulations established by Congress; and

(f) The Second Agreement is in violation of 44 U.S.C. §§ 3101-07, which require each federal agency (i) to preserve records relating to the "organization, functions, policies, decisions, procedures and essential transactions of the agency. . . ," (ii) to establish a continuing program for the "creation, maintenance and use of records in the conduct of current business. . . ," (iii) to "establish safeguards against the removal or loss of records" deemed to be necessary and required by the agency, and (iv) to inform and assist the Administrator of General Services and the Attorney General in the prevention of "any actual, impending or threatened unlawful removal, defacing, alteration or destruction of records in the custody of the agency. . . ."

39. Even if the Second Agreement had been entered into by defendant Kissinger in his official capacity as Secretary of State, or were now so construed, it would still be void, and of no force and effect, for the following reasons:

(a) The Second Agreement violates the procedures for disposing of Executive Branch records required under 44 U.S.C. §§ 3301-14 and therefore is contrary to Article IV, Section 3 of the Constitution; and

(b) The Second Agreement would deny plaintiffs and other members of the public access to the secretarial notes on the same terms as defendant Kissinger and his designees and thus violates the First and Fifth Amendments to the Constitution.

40. In agreeing to the terms of the Second Agreement, defendant Boorstin has exceeded his lawful authority as Librarian of Congress. Accordingly, the Library of Congress has no legal right to the secretarial notes of defendant Kissinger's telephone conversations and its continued possession of those notes is contrary to law.

VI. THE ARCHIVIST'S REQUEST

41. By a letter dated January 4, 1977 to defendant Kissinger, the Archivist of the United States indicated that portions of the secretarial notes covered by the Second Agreement might be official records which the United States Government had an obligation to retain. The letter, a copy of which is annexed hereto as Exhibit D, cited the Archivist's responsibilities under Federal statutes (44 U.S.C. §§ 2103, 2904, 2905 and 3303a and 44 U.S.C. § 2107) and requested that GSA archivists be permitted to review defendant Kissinger's secretarial notes to determine whether they met the definition of official records under these laws.

42. In a memorandum dated January 14, 1977, Monroe Leigh, Esq. considered the Archivist's request and concluded that it was improper. *Inter alia*, the memorandum, a copy of which is annexed as Exhibit E hereto, reaffirmed the Department's position that the secretarial notes of defendant Kissinger's conversations were his personal records. Relying on this memorandum, defendant Kissinger informed the Archivist that his request was being rejected in a letter dated January 18, 1977.

VII. PLAINTIFF SAFIRE'S FREEDOM OF INFORMATION ACT REQUEST

43. By a letter dated January 14, 1976, plaintiff William Safire submitted to the Department of State a request under the Freedom of Information Act for all transcripts of defendant Kissinger's official conversations that were encompassed by one of the following two descriptions:

> "1. Please send me photocopies of all transcripts (including rough drafts, if such exist) in which my name appears.
>
> "2. Please send me photocopies of all transcripts (including rough drafts, if such exist) of

> conversations between Mr. Kissinger and General Haig, or Mr. Kissinger and Attorney General John Mitchell, or Mr. Kissinger and J. Edgar Hoover, or Mr. Kissinger and any other official of the FBI, or of Mr. Kissinger and President Richard Nixon, in which the subject of 'leaks' of information was discussed."

This Freedom of Information Act request is attached as Exhibit F hereto.

44. By letter dated February 11, 1976, the Director of the Department's Freedom of Information Staff informed plaintiff Safire that his request had been denied. As one reason for that denial, the letter asserted that the materials sought "are not records of the Department of State or of any other 'agency' and, thus, are not 'agency records' within the meaning of the Freedom of Information Act."

45. By letter dated February 24, 1976, plaintiff Safire appealed the denial of his Freedom of Information Act request to the Chairman of the Department's Council on Classification Policy. This letter exercising plaintiff Safire's right of appeal is attached hereto as Exhibit G.

46. By letter dated March 29, 1976, plaintiff Safire's appeal was denied. As one reason for this action, the Chairman of the Department's Council on Classification Policy asserted that the "memoranda of telephone conversations have not been preserved as evidence of Department of State business" and reiterated the position that the documents sought "are not 'agency records' within the meaning of the Freedom of Information Act."

VIII. THE FREEDOM OF INFORMATION ACT REQUEST OF THE REMAINING PLAINTIFFS

47. By a letter dated January 13, 1977, plaintiffs, through their attorneys, submitted to the Department of State a

request under the Freedom of Information Act for, *inter alia:*

> "All transcribed secretarial notes of the telephone conversations held by Henry Kissinger during his government service as Assistant to the President for National Security Affairs, commencing on or about January 20, 1969, and during his service as Secretary of State, extending through the present time. These documents include all of the 'transcribed secretarial notes of [Secretary Kissinger's] telephone conversations' referred to in the Second Deed of Gift and Agreement, dated December 24, 1976, between Secretary Kissinger and Daniel J. Boorstin, Librarian of Congress."

A copy of plaintiffs' request is annexed hereto as Exhibit H.

48. By a letter dated January 28, 1977, the Department denied plaintiff's request for access to the secretarial notes of defendant Kissinger's official telephone conversations. A copy of this letter is annexed hereto as Exhibit I. As the ground for its denial of plaintiffs' request, the Department asserted that the notes were not "agency records" subject to the Freedom of Information Act and, in any event, the notes were no longer in the Department's custody:

> "The first part of your request pertains solely to the secretarial notes of telephone conversations involving former Secretary of State Kissinger. As you are aware, the Department's Legal Adviser concluded last year that these papers are not agency records under either the Freedom of Information Act or the Department of State regulations on record keeping. Instead, under the Department's regulations, these notes could be retained by Secretary Kissinger when he left office.

> "These conclusions are reflected in memoranda of the Legal Adviser, dated November 11, 1976 and January 14, 1977. Based on these conclusions, Dr. Kissinger donated all of the notes in question to the Library of Congress. All of the notes have been delivered to the Library of Congress, and they are presently owned by and in the custody of the Library."

The letter also stated that, because of the ground for the denial, an appeal to the Department's Council on Classification Policy was necessary neither under Department regulations nor under the Freedom of Information Act:

> "In conclusion, the Department cannot accede to the first portion of your request, on the ground that the papers requested are not agency records of the Department of State and are not in the custody or control of this Department. It is our view that this portion of your request is not technically subject to an appeal because the Department's appeal procedures (22 CFR 6.8) apply only where there has been a denial of existing "agency records" under one of the statutory exemptions of the Freedom of Information Act."

49. In order to discharge the functions and responsibilities of his profession, each of the plaintiffs has a particular and substantial need to obtain access to the secretarial notes of defendant Kissinger's phone conversations. Plaintiffs have in the past engaged in, and intend in the future to engage in, research, writing, analysis, interpretation and reporting on matters of current and historical importance and interest, including the Presidency and the decisions, policies and deliberations of the Government. Some of the plaintiffs are subject to contracts and professional commitments to publish books and other studies of the Nixon Administration. Their ability to fulfill

their responsibilities will be thwarted if their right of access to the presidential materials is temporarily or permanently denied. Plaintiffs will also be damaged if access is granted to defendant Kissinger or his designees prior to the time that plaintiffs have access to such materials.

50. The secretarial notes of defendant Kissinger's conversations constitute valuable, irreplaceable information resources of profound importance to plaintiffs in the conduct of their professions, and plaintiffs will be irreparably injured if custody of these materials remains in the Library of Congress under the terms specified by the two Agreements.

WHEREFORE, plaintiffs pray:

(a) That the Court declare that legal and equitable title to the secretarial notes has always been in the Department of State and not in defendant Kissinger;

(b) That the Court declare the First and Second Agreements to be null, void and of no legal effect insofar as they purport to effect a transfer from defendant Kissinger as a private citizen to the Library of Congress of the transcribed secretarial notes of defendant Kissinger's official telephone conversations;

(c) That the Court declare that the secretarial notes are now, and always have been, "agency records" subject to the Freedom of Information Act;

(d) That the Court issue an order in the nature of mandamus requiring the Librarian of Congress, defendant Boorstin, to relinquish custody over the secretarial notes and the Secretary of State, defendant Vance, to re-possess them;

(e) That the Court issue an order requiring the Secretary of State to produce to plaintiffs all the secretarial notes except those exempt from disclosure under one of the specific exemptions of the Freedom of Information Act;

(f) That the Court issue an order impounding the

secretarial notes of Secretary Kissinger's telephone conversations during the pendency of this action so that the notes will not be destroyed or modified and so that plaintiffs are assured of access to the notes on an equal footing with defendant Kissinger and his designees in the event they prevail in this action; and

(g) That the Court order such further relief as it may deem just and proper bearing in mind the rights of the plaintiffs to have access to governmental information.

/s/ Charles A. Horsky
Charles A. Horsky

/s/ Peter Barton Hutt
Peter Barton Hutt

/s/ Robert Matthew Sussman
Robert Matthew Sussman

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Attorneys For Plaintiffs

Dated: March 21, 1977

EXHIBIT A

DEED OF GIFT AND AGREEMENT

Henry A. Kissinger hereby donates to the United States of America, to be held and administered by the Library of Congress and its officials, as a gift to the nation, a collection of the papers relating to his years of government service and other periods of his life ("the Collection"). The Collection shall contain the papers described in a schedule to be prepared and attached hereto. In implementing this gift and as conditions to its donation, Henry A. Kissinger and the Library of Congress ("the Library") agree to the following:

1. *Purposes.* This Deed of Gift and Agreement are undertaken in order to assure —

   (a) That the Collection may be preserved for future historical and public use.
   (b) That national security information is protected.
   (c) That Henry A. Kissinger may have access to the Collection, so that he may prepare a historical account of his years in government, and so that he may in the future give information and testimony that may be requested of him concerning his years in office.
   (d) That rights of privacy and the reputations of other persons may be protected for a reasonable time.

2. *Papers in the Collection; Government Approval.* The Collection shall consist of (a) personal papers of Henry A. Kissinger ("Personal Papers"); and (b) copies of government papers of which there is an original or record copy in government files ("Government Papers"). The Personal Papers shall include handwritten notes, private letters, papers dating from Henry A. Kissinger's years at Harvard University, and similar materials. The copies of Government Papers are those which Henry A. Kissinger worked on or reviewed during his government service, and which

authorized officials have approved for inclusion in the Collection. Pre-existing government privileges with respect to copies of Government Papers in the Collection shall not be affected by this gift.

3. *Delivery of Papers.* Personal Papers in the Collection will be delivered to the Library within three months after the date this Deed of Gift and Agreement is signed. Copies of Government Papers to be included in the Collection will be delivered to the Library after they are reviewed by government officials with authority over the records, to assure that no original or record copies are included in the Collection, and will be delivered to the Library within three months after the date this Deed of Gift and Agreement is signed. Following each delivery of papers to the Library, the Library shall send to Henry A. Kissinger a written acknowledgment of the delivery.

4. *Future Public Access to Personal Papers.* Personal papers shall be made available for public access, but not until 25 years after the date of this Deed of Gift and Agreement, or until five years after the death of Henry A. Kissinger, whichever is later.

5. *Future Public Access to Copies of Government Papers.* The copies of Government Papers in the Collection shall be available for public access, but not until the period of time provided in paragraph 4 has elapsed; however, such papers shall not be available for public access unless the originating agency has determined that a paper contains no classified or restricted information.

6. *Use by Henry A. Kissinger.* Henry A. Kissinger shall have unrestricted access to all papers in the Collection during his lifetime. The Library shall make available to Henry A. Kissinger working space where he may use the Collection and other materials of the

Library. A research assistant or assistants engaged by Henry A. Kissinger shall be given access to the Collection, provided they have appropriate and current government-approved security clearances.

7. *Use by Others During Interim Period.* Until the period described in paragraph 4 has elapsed, access to the Collection shall be limited (a) to such employees of the Library as may be jointly approved by the Librarian of Congress and Henry A. Kissinger; (b) to persons who have received the written permission of Henry A. Kissinger; and (c) after the death of Henry A. Kissinger, to persons who have received the written permission of a committee to be named in Henry A. Kissinger's will. Henry A. Kissinger shall, during this period, be promptly notified by the Library of Congress of any requests, claims, or legal actions relating to papers in the Collection. No person may have access under this paragraph to any classified paper in the Collection unless he has an appropriate and current government-aproved security clearance commensurate with the classification of the paper.

8. *Additions.* Henry A. Kissinger may in the future donate additional personal papers and materials to be added to the Collection. Such additional personal papers and materials shall be governed by this Deed of Gift and Agreement. Their delivery shall be accompanied or preceded by a letter or statement signed by Henry A. Kissinger, and the Library shall send to Henry A. Kissinger a written acknowledgment of each delivery.

Witnessed and agreed to, this 12th day of November, 1976.

/s/ Henry A. Kissinger
Henry A. Kissinger

Accepted and agreed to on behalf of the Library of Congress, this 12th day of November, 1976.

/s/ Daniel J. Boorstin
Daniel J. Boorstin
Librarian of Congress

EXHIBIT C

SECOND DEED OF GIFT AND AGREEMENT

Henry A. Kissinger hereby donates to the United States of America, to be held and administered by the Library of Congress and its officials as part of a collection of papers of Henry A. Kissinger, additional personal papers consisting of the transcribed secretarial notes of his telephone conversations. In implementing this gift and as conditions to its donation, Henry A. Kissinger and the Library of Congress agree to the following:

1. The terms and conditions of the Deed of Gift and Agreement executed on November 12, 1976 by Henry A. Kissinger and the Librarian of Congress ("First Deed of Gift") are hereby incorporated by reference and extended to the present gift, except as provided in paragraph 2 below.

2. At the end of the period of time described in paragraph 4 of the First Deed of Gift, any paper included in this Second Deed of Gift shall become available for public access unless one of the parties to the telephone conversation is still living in which case such a paper shall become available for public access only with his consent or upon his death.

Witnessed and agreed to, this 24th day of December, 1976.

/s/ Henry A. Kissinger
Henry A. Kissinger

Accepted and agreed to on behalf of the Library of Congress, this 25th day of December, 1976.

/s/ Daniel J. Boorstin
Daniel J. Boorstin
Librarian of Congress

EXHIBIT D

UNITED STATES OF AMERICA
GENERAL SERVICES ADMINISTRATION

National Archives and Records Service
Washington, D.C. 20408

January 4, 1977

Honorable Henry Kissinger
Secretary of State
Washington, D.C. 20520

Dear Mr. Secretary:

It has come to my attention that materials relating to your public service are being deposited in the Library of Congress under terms that are based upon the presumption that such materials are or were personal property. Among these materials you have included a set of transcripts or notes that were systematically kept reflecting the substance of telephone conversations.

I recognize that you obtained the advice of legal counsel in the Department of State concerning those telephone transcriptions. I also appreciate fully the sensitive nature of your responsibilities in the national security and foreign relations areas and the concomitant requirement that candid and unguarded conversation in the conduct of foreign relations must be duly protected.

Nevertheless, as Archivist of the United States, by authority delegated to me by the Administrator of General Services, I am responsible by law (sections 2103, 2904, 2905, and 3303a of title 44, United States Code) for ascertaining that Federal agencies create, maintain and dispose of their records in an efficient and lawful manner, and that they preserve records of permanent historical value for eventual deposit in the national archival system. Further, in accordance with Title I of the Presidential Recordings and

Materials Preservation Act (P.L. 94-526; 44 U.S.C. 2107 note), I am responsible for assuming custody and control of the Presidential historical materials of the Nixon administration. I believe those statutory authorities and responsibilities require that I conduct an inspection of the documentary materials mentioned above to verify the conclusions made and actions taken concerning them.

To carry out these responsibilities I enlist your cooperation in permitting qualified archivists from my staff to be given the opportunity to examine the telephone transcriptions and any related documents that you have deposited with the Library of Congress. These professional archivists will determine whether such materials are, indeed, personal property or whether some portions of them may be Federal records or Nixon historical materials. I guarantee the protection of any confidential information which these archivists may encounter during their inspection. In addition, I ask your cooperation as Secretary of State in providing access to any memoranda of conversations or other pertinent records in the Department of State that may assist our archivists in carrying out their task.

I would appreciate your making arrangements with the Librarian of Congress so that my staff can have access to these materials for the purposes of this determination. When the process is completed I plan to formulate a report, including recommendations, which I shall transmit to you and, as appropriate, to officials in the White House and the Department of State.

Sincerely,

/s/ James B. Rhoads
JAMES B. RHOADS
Archivist of the United States

EXHIBIT F

THE NEW YORK TIMES
WASHINGTON BUREAU
1920 L Street, N.W.
Washington, D.C. 20036
(202) 293-3100

William Safire

January 14, 1976

The Secretary of State
State Department
Washington, D.C.

Sir:

Under the provisions of the Freedom of Information Act, as amended, I request information from transcripts of telephone conversations now in the custody of Mr. Lawrence S. Eagleburger of the State Department.

For verification of the existence of such records, your attention is called to "Federal Defendant Kissinger's responses to plaintiffs' first set of interrogatories", Civil Action No. 1187-13 in the U.S. District Court for the District of Columbia, pp. 46-47, which reads:

"With respect to records of telephone conversations in which I participated and correspondence I wrote or received during the period January 21, 1969 through February 12, 1971:

"Business telephone conversations from my White House office during this period were usually monitored by my personal secretaries and records prepared, in accordance with routine government practice, in order to facilitate implementation and follow-up of business transacted.

"Correspondence was deposited with White House Central Files or Substantive Files.

"71 B. Where and in whose custody are such records

now? If you do not know where they are now, where and in whose custody were they last, to your knowledge?

"Response: All such records, with the exception of the records of my telephone calls, are in the White House. They are in the custody of the NSC staff. The telephone records are in the State Department, in the custody of Mr. Lawrence S. Eagleburger.

signature
HENRY A. KISSINGER"

1. Please send me photocopies of all transcripts (including rough drafts, if such exist) in which my name appears.

2. Please send me photocopies of all transcripts (including rough drafts, if such exist) of conversations between Mr. Kissinger and General Haig, or Mr. Kissinger and Attorney General John Mitchell, or Mr. Kissinger and J. Edgar Hoover, or Mr. Kissinger and any other official of the FBI, or of Mr. Kissinger and President Richard Nixon, in which the subject of "leaks" of information was discussed.

As you know, the amended Act provides that if some parts of a file are exempt from release that "reasonably segregable" portions shall be provided. I therefore request that, if you determine that some portions of the requested information are exempt, you provide me immediately with a copy of the remainder of the file. I, of course, reserve my right to appeal any such decisions.

If you determine that some or all of the requested information is exempt from release, I would appreciate your advising me as to which exemption(s) you believe covers the information which you are not releasing.

I am prepared to pay costs specified in your regulations for locating the requested files and reproducing them.

As you know, the amended Act permits you to reduce or waive the fees if that "is in the public interest because furnishing the information can be considered as primarily benefiting the public." I believe that this request plainly fits that category and ask you to waive any fees.

If you have any questions regarding this request, please telephone me at the number on this letterhead.

As provided for in the amended Act, I will expect to receive a reply within ten working days.

Sincerely yours,

William Safire
Social Security #: 103 22 7703
Date of Birth: 12/17/29
Place of Birth: New York, USA

EXHIBIT G

THE NEW YORK TIMES
WAHINGTON BUREAU
1920 L Street, N.W.
Washington, D.C. 20036
(202) 293-3100

William Safire

February 24, 1976

Assistant Secretary of State for Public Affairs
Chairman, Council on Classification Policy
Department of State
Washington, D.C. 20520

Case No. 610050

Sir:

This is to appeal the denial of my request for information from transcripts of telephone conversations now in the custody of Mr. Lawrence S. Eagleburger of the State Department.

In the State Department denial dated Feb. 11, 1976, in paragraph one of page two, it is stated: "The documents are in rough draft form and have never been reviewed for accuracy." That statement is false. I know from personal observation that in some instances, Henry A. Kissinger reviewed the rough draft of what purported to be a verbatim transcript of a telephone conversation, made changes, and ordered the document retyped. I request the names of those members of the Office of Legal Adviser and other personnel of the State Department who were responsible for the preparation of the February 11 letter, as well as the names of those who prepare the answer to this appeal.

In paragraph 2 of page two, it is stated: "The documents are not subject to the Freedom of Information Act. Both because of the nature of the documents and because of Dr. Kissinger's position at the time the documents were made,

they are not records of the Department of State or of any other 'agency' and, thus, are not 'agency records' within the meaning of the Freedom of Information Act."

If the documents are not those of any agency, what are they? Does Secretary Kissinger claim that they are his personal property and not that of the U.S. Government? Or does he claim that these are "White House papers"? If they are White House papers, why were they taken from the White House? The White House, which is aware of the existence of these papers, has made no claim to recover them. The only set of these papers exists at the State Department, with a State Department custodian, and it is ludicrous to pretend that they are the only White House papers not at the White House.

In paragraph 3. of the denial, the Department says: "Even if the documents in question were considered to be 'agency records' within the meaning of the Act, they would appear to fall clearly within Exemption 5 of that Act. In addition, other specific statutory exemptions, notably Exemption 1, would be applicable, as would claims of invasion of privacy."

"They would appear to fall clearly" is nonsense. "They would appear" is tentative and conditional; "clearly" is certain and unconditional. Exemption 5 centers on the formulation of policy. The policy on leaks was adopted early in 1969; discussions of leaks and complaints thereof following that time did not deal with the formulation of policy. The Department's claim of exemption 5 to conceal discussions about leaks which took place after the policy was laid down is without merit: an additional claim of invasion of privacy, especially in those matters concerning this appellant, is in error.

As to Exemption 1: Undoubtedly, some classified information exists in those documents, but I have not requested classified information. I have requested all tran-

scripts of conversations "in which the subject of 'leaks' of information was discussed." Such discussions cannot be said to be classified. The material I have requested can be separated from the documents, as is frequently done with many Freedom of Information requests.

Since you have claimed Exemption 1, would you please inform me if these documents have been "properly classified pursuant to such executive order."

In paragraph 4 of the denial, the Department states: "Beside falling outside the purview of the Freedom of Information Act, the docu nents are not contained in any file which is retrievable or indexed by any name or identifying symbol or code; therefore, they are not subject to disclosure under the Privacy Act, 5 U.S.C. 552a."

If this were true, then the Privacy Act, 5 U.S.C. 552a could be circumvented simply by refraining from indexing material that ought to be available to citizens.

In your reply to this appeal, please describe the method by which these documents are kept. All in a jumbled-up pile, or in file cabinets; no order, or in chronological order; in illegible form, or in typed sheets; any cross-referencing or number of subject headings. Can file clerks, going through the documents in chronological order, find the information requested without leaving a single location?

The final paragraphs of your denial of these records asserts that "this letter is not a denial of a 'record'" as defined in your regulations.

A record cannot exist in some kind of bureaucratic limbo; a record must have a home.

These records, made on government time by government personnel on government material, are located at the State Department and no place else. These records have been publicly described, rightly or wrongly, by the State Department custodian as "working papers" of the Secretary of

State. To hold that they are not State Department papers is to make a claim that defies reason and the law.

Accordingly, I demand that you make available to me those portions of those documents previously requested as soon as diligent application of clerical help makes feasible.

Very truly yours,

/s/ William Safire
William Safire

EXHIBIT H

COVINGTON & BURLING
888 Sixteenth Street, N.W.
Washington, D.C. 20006

January 13, 1977

The Director
Freedom of Information Staff
Bureau of Public Affairs
Department of State
Washington, D.C. 20520

Dear Sir:

On behalf of the Reporters Committee for Freedom of the Press, the American Historical Association, the American Political Science Association and the eight individuals identified below, we request access, pursuant to the Freedom of Information Act, to the following documents and materials:

1. All transcribed secretarial notes of the telephone conversations held by Henry Kissinger during his government service as Assistant to the President for National Security Affairs, commencing on or about January 20, 1969, and during his service as Secretary of State, extending through the present time. These documents include all of the "transcribed secretarial notes of [Secretary Kissinger's] telephone conversations" referred to in the Second Deed of Gift And Agreement, dated December 24, 1976, between Secretary Kissinger and Daniel J. Boorstin, Librarian of Congress;

2. All other secretarial notes, transcripts, recordings or other materials that reflect, verbatim or substantially verbatim, the contents of the conversations, telephonic and otherwise, held by

Henry Kissinger during his government service as Assistant to the President For National Security Affairs, commencing on or about January 20, 1969, and during his service as Secretary of State, extending through the present time.

Based on the November 24, 1976 Deed of Gift and Agreement and on a Memorandum to the Secretary of Mr. Monroe Leigh, Esq., dated November 11, 1976, it is our understanding that the Department takes the position that the materials we are requesting are the personal property of Secretary Kissinger and, as such, are not "agency records" subject to disclosure under the Freedom of Information Act. While we vigorously dispute the validity of this position, we recognize that it necessarily requires the denial of our request and makes both the request and any subsequent appeal futile.

On the assumption that our understanding of the Department's position is accurate, we are therefore proposing a procedure for eliminating unnecessary paperwork and bringing this matter before an appropriate court without undue delay. We ask the Department to reiterate, in writing, its formal position that the materials we are seeking do not constitute "agency records" covered by the Freedom of Information Act, to state that our request would necessarily have to be denied for this reason, and to agree not to contest our standing under the Freedom of Information Act to obtain judicial review of the Department's rationale for that denial. As an alternative to the above procedure, we ask simply that the Department expedite the processing of our request so that an initial denial and unsuccessful appeal are completed as soon as possible.

We understand that a portion of the materials we are requesting is still in the physical custody of the Department. Until legal proceedings growing out of this Freedom of Information Act request have been resolved, we believe it would be highly improper for the Department to relinquish

custody of these materials and we therefore urge the Department to refrain from taking any such actions. At the same time, we are prepared to maintain that the Department's obligation to provide the materials encompassed by our request is a continuing one and must be discharged regardless of where the materials may physically reside at any given time.

Before closing this letter, we would like to state again our clients' reasons for challenging the Department's publicly announced position that the transcripts are "private diaries."

For eight years, Secretary Kissinger has reportedly had several secretaries making nearly verbatim summaries of his official conversations. According to Mr. Leigh's memorandum, Secretary Kissinger has used these summaries repeatedly and continuously as an aid to performing his duties. If these reports are accurate, the summaries reflect a high public official making records of his official conversations during the course of his public employment, using these records over and over again as part of his employment, and utilizing government employees and facilities to prepare, edit and store the resulting documents. Therefore, our clients take the position that the materials we seek are the property of the people and government of the United States, not of Mr. Kissinger, and that, like the official work records of all other public employees, access to them must be governed by the Freedom of Information Act, not the personal predilections of Secretary Kissinger.

Our clients' resolve in this matter is reinforced by the character of these materials, which probably constitute the most valuable collection of background materials ever assembled on the conduct of American foreign policy because of their volume and accuracy and because of the uniquely influential role Secretary Kissinger has played over the past eight years. In addition, our clients believe

that these documents will disclose much important information about domestic politics, perhaps including the Watergate resignation crises. In short, if disclosed, these materials may be of enormous value to historians, political scientists and journalists carrying out their obligations to inform the public about the conduct of its government on important issues over the past eight years.

Our clients' position is precisely that advanced by the Reporters Committee, the American Historical Association and the American Political Science Association in the case of *Nixon v. Sampson*, 389 F. Supp. 107 (D.D.C. 1975) — that Mr. Nixon's work product as a President belongs to the public and not to Mr. Nixon. The Department should be informed that, as in that case, should you deny our request, all of the groups and individuals listed below have authorized a lawsuit to be brought promptly on their behalf.

Sincerely yours,

/s/ Charles A. Horsky
Charles A. Horsky

/s/ Peter Barton Hutt
Peter Barton Hutt

/s/ Robert Matthew Sussman
Robert Matthew Sussman

Attorneys for:
The Reporters Committee for Freedom of the Press
American Historical Association
American Political Science Association
James MacGregor Burns
Nat Hentoff
Donald G. Herzberg

William Leuchtenburg
Arthur Link
J. Anthony Lukas
Austin Ranney
Clement E. Vose

cc: Monroe Leigh, Esq.
Michael Sandler, Esq.

EXHIBIT I

DEPARTMENT OF STATE
THE LEGAL ADVISER
Washington

January 28, 1977

Charles A. Horsky, Esq.
Covington & Burling
888 Sixteenth Street, N.W.
Washington, D.C. 20006

Dear Mr. Horsky:

I write in response to your letter of January 13, 1977, in which you request, on behalf of a number of individuals and organizations, access under the Freedom of Information Act to (1) "all transcribed secretarial notes of the telephone conversations held by Henry Kissinger during his government service" from January 20, 1969 onwards, and (2) "all other secretarial notes, transcripts, recordings or other materials that reflect, verbatim or substantially verbatim, the contents of the conversastions, telephonic and otherwise, held by Henry Kissinger" during the same period.

The first part of your request pertains solely to the secretarial notes of telephone conversations involving former Secretary of State Kissinger. As you are aware, the Department's Legal Adviser concluded last year that these papers are not agency records under either the Freedom of Information Act or the Department of State regulations on record keeping. Instead, under the Department's regulations, these notes could be retained by Secretary Kissinger when he left office.

These conclusions are reflected in memoranda of the Legal Adviser, dated November 11, 1976 and January 14, 1977.

Based on these conclusions, Dr. Kissinger donated all of the notes in question to the Library of Congress. All of the notes have been delivered to the Library of Congress, and they are presently owned by and in the custody of the Library.

Also pursuant to Department of State regulations, extracts from several of the notes have been prepared and delivered to the Department of State for inclusion in Departmental record files. It appears that the first part of your request pertains only to the actual secretarial notes and not to these extracts.

The second part of your request extends to any materials other than the papers covered by the first part, which reflect "verbatim or substantially verbatim" the contents of any conversations "telephonic and otherwise" involving former Secretary of State Kissinger. This portion of the request would appear to include a broad range of materials including memoranda of meetings in which the Secretary of State participated. Verbatim or substantially verbatim memoranda were prepared for virtually every formal meeting in which Secretary Kissinger participated, by notetakers present at these meetings.

In the Department's view, this portion of the request is unreasonably broad, and does not reasonably and with sufficient particularity describe documents subject to a Freedom of Information Act request. It is our belief that it was not the intention of the Congress, in enacting the Freedom of Information Act, to require agencies to devote their resources to respond to sweeping and indiscriminate requests, and thereby subordinate the general public interest to the desire of a few individuals or groups to peruse a broad range of documents.

In conclusion, the Department cannot accede to the first portion of your request, on the ground that the papers requested are not agency records of the Department of

State and are not in the custody or control of this Department. It is our view that this portion of your request is not technically subject to an appeal because the Department's appeal procedures (22 CFR 6.8) apply only where there has been a denial of existing "agency records" under one of the statutory exemptions of the Freedom of Information Act. Nevertheless, you would not be precluded from requesting the Department to reconsider its position based on additional written arguments or information.

The Department cannot accede to the second portion of your request, on the ground that although the papers covered may in many instances be agency records, the request is unreasonably broad and does not reasonably describe documents subject to a Freedom of Information Act request. Again, it is our view that this position is not technically subject to an appeal under the Department's regulations. Again, however, you would not be precluded from requesting the Department to reconsider this position based on additional written argument or information.

Sincerely,

/s/ George H. Aldrich
George H. Aldrich
Acting Legal Adviser

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MILITARY AUDIT PROJECT, et al., Plaintiffs,	)	
v.	)	Civil Action
DEPARTMENT OF STATE, et al., Defendants.	)	No. 77-0391

MOTION FOR SUMMARY JUDGMENT

Plaintiffs move for summary judgment declaring that:

(1) the secretarial notes of conversations of former Secretary of State Kissinger are agency records of the Department of State subject to the Freedom of Information Act, 5 U.S.C. § 552 ("the FOIA");

(2) any restrictions on access to such records, save those expressly provided in the FOIA, are unlawful;

(3) the records are not properly classified or otherwise exempt from disclosure under FOIA Exemption 1, 5 U.S.C. § 552(b)(1), or exempt under any other FOIA exemption;

and ordering that plaintiffs be given immediate access to the records for inspection and copying.

Plaintiffs request a hearing on this motion.

Respectfully submitted,

/s/ William A. Dobrovir
WILLIAM A. DOBROVIR
ANDRA N. OAKES
DAVID L. SCULL
2005 L Street, N.W.
Washington, D.C. 20036
Attorneys for Plaintiffs

April 14, 1977

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MILITARY AUDIT PROJECT, et al., Plaintiffs,	)	
v.	)	Civil Action
DEPARTMENT OF STATE, et al., Defendants.	)	No. 77-0391

STATEMENT OF MATERIAL FACTS
AS TO WHICH THERE IS NO
GENUINE ISSUE

1. The complaint in this action was filed on March 8, 1977, and served on defendant Department of State on March 10, 1977, on defendants Daniel Boorstin, Librarian of Congress, and James B. Rhoads, Archivist of the United States, on March 14, 1977, and on defendant Henry A. Kissinger on March 24, 1977. More than twenty days have elapsed since service on the last defendant served. More than thirty days have elapsed since service on all defendants except Henry A. Kissinger, but no responsive pleading has yet been received despite the express 30-day requirement of law. 5 U.S.C. § 552(a)(4)(C).

2. On December 28, 1976, plaintiffs requested from defendant Department of State access, under the Freedom of Information Act, to the records of conversations of the Secretary of State, Henry A. Kissinger, with foreign heads of state, heads of government, ambassadors, foreign ministers and national security adivsers ("the records") (Exhibit 1). Plaintiffs made a second request on December 29, 1976, for records of conversations of the Secretary of State with anyone (Exhibit 2).

3. By letter dated January 18, 1977 (Exhibit 3), the Department of State denied the requests on the ground that

the records requested were "personal" and "are not and never have been agency records of the Department of State." Plaintiffs appealed the denial (Exhibit 4). The appeal was denied on March 4, 1977 (Exhibit 5). Plaintiffs have exhausted their administrative remedies.

4. On November 11, 1976, the Legal Adviser of defendant Department of State, Monroe Leigh, Esq., stated in a memorandum to defendant Henry A. Kissinger that the records had been reviewed by the Department of State Council on Classification Policy "and found that they did not contain classified information" (Exhibit 6; emphasis in original).

5. On or about December 24, 1976, defendants Henry A. Kissinger and Daniel J. Boorstin executed a purported donation of the records to the Library of Congress, which purports to prevent access to the records by the public and all persons other than defendant Kissinger for 25 years or five years after the death of Henry A. Kissinger, whichever is later, with unrestricted use only by Henry A. Kissinger and persons named or approved by him (see Exhibit 7).

6. On or about December 28, 1976, defendant Kissinger physically placed the records in the Library of Congress pursuant to the purported donation described in paragraph 5 (see Exhibit 8).

7. On January 4, 1977, defendant James B. Rhoads, Archivist of the United States, requested access to the records to determine whether they are in whole or in part records within the meaning of applicable laws and regulations (Exhibit 8). On January 18, 1977, defendants Department of State and Kissinger denied the request (Exhibit 9).

8. On February 11, 1977, the Archivist repeated his request (Exhibit 10).

9. The Archivist relied on an opinion by the General Counsel of the General Services Administration (Exhibit

11) which concluded that:

> The Archivist of the United States has the authority and responsibility to make an independent determination of the character (federal records, Nixon historical materials or personal papers) of the telephone transcripts and related documents created or received by former Secretary of State and Assistant to the President for National Security Affairs Henry A. Kissinger during the course of his service in those positions.

10. On January 19, 1977, the Congressional Research Service of the Library of Congress, under the supervision of defendant Boorstin, Librarian of Congress, rendered an opinion (Exhibit 12) that since the recorded conversations were conducted by defendant Kissinger as "part of the official duties of the Secretary of State [,] [t]he transcripts of those conversations would therefore relate to the Secretary's public rather than private capacity," that such materials "are the public property of the United States rather than the personal property of the official" and therefore that "ownership of the secretarial transcripts in question is vested in the United States Government rather than Secretary Kissinger" (*id.* 5-6).

11. The opinion of the Congressional Research Service was based on a written opinion of defendant Department of State that monitoring of telephone conversations is prohibited except when "deemed absolutely essential to the conduct of business," as provided in Federal Property Management Regulations (FPMR 101-35.308) (Exhibit 13).

12. On January 24, 1977, defendant Department of State forbade all officers and employees to monitor or record telephone conversations except with the express consent of the Secretary of State or his Deputy (Exhibit 14).

Respectfully submitted,

/s/ William A. Dobrovir
WILLIAM A. DOBROVIR
ANDRA N. OAKES
DAVID L. SCULL
2005 L Street, N.W.
Washington, D.C. 20036

April 14, 1977

Attorneys for Plaintiffs

EXHIBIT 1

WILLIAM A. DOBROVIR/ANDRA N. OAKES
JOSEPH D. GEBHARDT/DAVID L. SCULL
2005 L Street, N.W. Washington, D.C. 20036
(202) 785-8919

December 28, 1976

BY HAND

Barbra Ennis, Director
Freedom of Information Staff
Room 2811
Department of State
2201 C Street, N.W.
Washington, D.C. 20520

Dear Ms. Ennis:

On behalf of Military Audit Project (MAP) and Felice D. Cohen, Director of MAP, we request access, for the purpose of reading of written documents and listening to tape or other sound recordings, and for copying of those we may select after inspection, to the following records presently physically located in or in the custody of the Department of State:

All memoranda, aide memoirs, memoranda of conversations, secretarial notes, voice recordings or other written or recorded records of all conversations between Henry A. Kissinger and:

(1) the head of state or head of government of any foreign nation;

(2) the ambassador to the United States from any foreign nation;

(3) the foreign minister or foreign secretary, the national security advisor or any other official of

any foreign nation with responsibility for the foreign affairs, foreign relations or security of such nation.

This request includes all such records, whether or not purportedly designated as "personal" pursuant to §§ 417.1 or 432 of the State Department Manual; see GSA Bulletin FPMR B-65, 41 Fed. Reg. 51149 (November 19, 1976).

We further request that, until administrative consideration (and, if necessary, court proceedings) respecting this request are concluded, the records in question remain in the Department of State and not be removed therefrom. If this request is not to be honored, we request immediate notification thereof. We expect a reply within 10 working days, i.e., no later than the close of business, Wednesday, January 12, 1977.

Very truly yours,

/s/ William A. Dobrovir
William A. Dobrovir
Attorney for Military Audit
Project and Felice D. Cohen

WAD:crk

cc: Hon. Henry A. Kissinger
Secretary of State

Monroe Leigh, Esq.
Legal Adviser

EXHIBIT 2

WILLIAM A. DOBROVIR/ANDRA N. OAKES
JOSEPH D. GEBHARDT/DAVID L. SCULL

2005 L Street, N.W. Washington, D.C. 20036
(202) 785-8919

December 29, 1976

BY HAND

Barbra Ennis, Director
Freedom of Information Staff
Room 2811
Department of State
2201 C Street, N.W.
Washington, D.C. 20520

Dear Ms. Ennis:

On behalf of Military Audit Project (MAP) and Felice D. Cohen, Director of MAP, we request access, for the purpose of reading of written documents and listening to tape or other sound recordings, and for copying of those we may select after inspection, to the following records presently physically located in or in the custody of the Department of State:

All memoranda, aide memoirs, memoranda of conversations, secretarial notes, voice recordings or other written or recorded records of all conversations between Henry A. Kissinger and any other person, conducted by Mr. Kissinger in his capacity as Secretary of State and in his capacity as National Security Adviser.

This request includes all such records, whether or not purportedly designated as "personal" pursuant to §§ 417.1 or 432 of the State Department Manual; see GSA Bulletin FPMR B-65, 41 Fed. Reg. 51149 (November 19, 1976).

We further request that, until administrative consideration (and, if necessary, court proceedings) respecting this request are concluded, the records in question remain in the Department of State and not be removed therefrom. If this request is not to be honored, we request immediate notification thereof. We expect a reply within 10 working days, i.e., no later than the close of business, Thursday, January 13, 1977.

Very truly yours,

/s/ William A. Dobrovir
William A. Dobrovir
Attorney for Military Audit
Project and Felice D. Cohen

WAD: crk
cc: Hon. Henry A. Kissinger
Monroe Leigh, Esq.

EXHIBIT 3

DEPARTMENT OF STATE
Washington, D.C. 20520

January 18, 1977

Mr. William A. Dobrovir
2005 L Street, Northwest
Washington, D.C.

Dear Mr. Dobrovir:

I refer to your requests of December 28 and 29 under the Freedom of Information Act for "all memoranda, aide memoirs, memoranda of conversations . . . or other written or recorded records of all conversations" between Henry A. Kissinger and certain enumerated classes of foreign officials (December 28 request) or between "Henry A. Kissinger and any other person conducted by Mr. Kissinger in his capacity as Secretary of State" and as National Security Adviser (December 29 request). Since any records encompassed by the December 28 request are necessarily covered by the December 29 request, we consider the former to be superseded by the latter.

As you may know, prior to the submission of either request, secretarial notes which constituted the Secretary's personal records of telephone conversations had been transferred to the Library of Congress. In addition, these notes themselves are not and have never been agency records of the Department of State. We have, however, carefully considered the remainder of your request. I must inform you that the Department of State cannot comply because your request is unreasonably broad and because it does not reasonably describe the records sought.

It is not possible within the available resources of this Department to process your request. Moreover, it is our

belief that it was not the intention of the Congress to require agencies to devote their resources to respond to sweeping, indiscriminate requests such as this and thereby subordinate the general public interest to one individual's desire to use a broad range of documents.

If you wish to appeal this denial to the Department's Council on Classification Policy, you may do so in accordance with the enclosed regulations.

Sincerely,

/s/ Monroe Leigh
Monroe Leigh
Legal Adviser

Enclosure:
22 CFR § 6.8

EXHIBIT 4

WILLIAM A. DOBROVIR/ANDRA N. OAKES/
JOSEPH D. GEBHARDT/DAVID L. SCULL
2005 I. Street, N.W. Washington, D.C. 20036
(202) 785-8919

January 24, 1977

Ambassador John E. Reinhardt
Assistant Secretary of State
for Public Affairs
Chairman, Council on Classification
Policy
Department of State
2201 C Street, N.W.
Washington, D.C. 20520

Re: FOIA Request of
Military Audit Project

Dear Assistant Secretary Reinhardt:

This is an appeal from the denial, dated January 18, 1977, of two Freedom of Information Act requests: (a) a request of December 28, 1976, and (b) a request of December 29, 1976. Copies of all three are attached. The January 18, 1977, denial signed by then Legal Adviser Monroe Leigh, received by us on January 22, 1977, denied both our December 28, 1976, request for the records of specific conversations of then Secretary of State Kissinger with certain specifically described foreign government officials, and our December 29, 1976, request for records of all his conversations.

The January 18 denial states that "secretarial notes which constituted the Secretary's personal records of telephone conversations had been transferred to the Library of Congress." We are also aware that at former Secretary Kissinger's instance, Mr. Leigh in November 1976 gave him a written legal opinion that these conversations were his personal property.

Accordingly, it is obvious that the Leigh letter's assertion that our request does not reasonably describe the records in question was not made in good faith. They were sufficiently described to be the subject of his legal opinion; they were sufficiently described to be carted off first to the private property of former Vice President Rockefeller and then to the Library of Congress. Finally, the letter improperly and wrongly asserts that the first, specific request was superseded by the second, broader request.

The essence of the denial, however, is that, by reason of Mr. Leigh's November 1976 opinion that the records of the Secretary of State's conversations are "personal," they "are not and have never been agency records of the Department of State." We submit that it was highly improper for the Secretary of State to ask for a legal opinion from the Legal Adviser of the Department which was worth a great deal of money to the Secretary (by reason of Mr. Kissinger's desired exclusive access to the records for the purpose of writing his memoirs); still more improper for the Legal Adviser to give such an opinion, and still more improper for the same Legal Adviser then to rule on a Freedom of Information request for the same records.

We further submit that the records are records of the Department of State, an agency of the United States within the meaning of 5 U.S.C. § 552, and of 18 U.S.C. § 641 and 44 U.S.C. §§ 3101-07, 3301-14, as implemented in regulations of the Department of State, §§ 411, 412, 417, 423, 432 and 436 of the Foreign Affairs Manual and regulations of the General Services Administration, GSA

Buleltin FPMR B-65, ¶ 4(c), 41 Fed. Reg. 51149 (November 19, 1976).

For the foregoing reasons, we appeal the denial of:

(a) our request for records of conversations of former Secretary Kissinger with certain specifically described foreign officials, dated December 28, 1976; and

(b) our request for records of all of former Secretary Kissinger's conversations, dated December 29, 1976.

You are expressly informed that the December 29, 1976, request does not supersede the December 28, 1976, request; we appeal the denial of each request separately.

Moreover, we request that as lawful custodian of the records, the Department immediately take all steps necessary, including a civil suit for conversion or requesting criminal prosecution under 18 U.S.C. § 641 if necessary, to have the records which were removed from the Department by former Secretary Kissinger immediately returned to the Department so that they can be made available to us pursuant to the Freedom of Information Act.

We request a reply within 20 working days, or no later than February 22, 1977.

Very truly yours,

/s/ William A. Dobrovir
William A. Dobrovir

cc: Hon. Cyrus Vance, Secretary of State
Hon. Matthew Nimetz, Counselor of the Department of State
George H. Aldrich, Esq., Acting Legal Adviser

EXHIBIT 5

DEPARTMENT OF STATE
Washington, D.C. 20520

March 4, 1977

William A. Dobrovir, Esq.
William A. Dobrovir, Andra N. Oakes,
Joseph D. Gebhardt, David L. Scull
2005 L Street, N.W.
Washington, D.C. 20036

Dear Mr. Dobrovir:

This is in response to your letter of January 24, in which you appeal the Department's denial of requests you have made under the Freedom of Information Act.

Your original request, dated December 28, 1976, asked for "all memoranda, aide memoires, memoranda of conversations, secretarial notes, voice recordings or other written or recorded records of all conversations between Henry A. Kissinger and [three categories of foreign officials]." By a second request dated December 29, 1976, you asked for the same categories of materials relating to conversations between Henry A. Kissinger "and any other person." Both requests were denied by a letter of the former Legal Adviser, dated January 18, 1977.

Having reviewed the initial denial and your request for an appeal, the Department has decided to reaffirm the initial decision to deny your requests. Specifically, the Department has taken into account the following considerations:

There are in essence two aspects to your requests. The first aspect pertains to the secretarial notes of telephone conversations of former Secretary of State Kissinger which were donated by the former Secretary to the Library of Congress. The status of those notes is currently the subject of litigation: *The Reporters Committee for Freedom of the*

Press, et al v. Vance, et al, D.D.C. No. 77-0220 (filed February 8, 1977). Under these circumstances, the Department is not in a position to accede to this aspect of your request.

The second aspect pertains to documents which the Department does have in its possession. It would extend, however, to every piece of paper and all materials that reflect any conversations of the former Secretary of State. The request apparently includes aide memoires, diplomatic notes, memoranda of meetings, memoranda of telephone conversations, and correspondence between the former Secretary and persons both within and without the Department of State — a very large and undifferentiated volume of material. In the Department's view, this portion of your request is unreasonably broad, and does not in the terms of the Act reasonably describe documents properly subject to a Freedom of Information Act request.

In sum, the Department has reviewed its initial denial of your requests, but again concludes that it cannot accede to those requests. As you will be aware, you may seek judicial review of this decision.

Sincerely,

/s/ William D. Blair, Jr.
William D. Blair, Jr.
Acting Chairman
Council on Classification Policy

EXHIBIT 6

DEPARTMENT OF STATE
LEGAL ADVISER
WASHINGTON

November 11, 1976

Limited Official Use

MEMORANDUM TO THE SECRETARY

Legal Status of Transcribed Notes
of Your Telephone Conversations

In light of today's story in the *Washington Post* (copy attached), I thought it would be useful if I summarized the advice and opinions I have given over the last eleven months on the question of whether the transcribed secretarial notes of your telephone conversations should be considered as the records of any government agency, or as essentially personal papers that you are entitled to retain when you leave office.

The question first arose last January, when a request was filed under the Freedom of Information Act for some of these papers. At that time, I expressed my opinion that these papers were not "agency records" within the meaning of the Freedom of Information Act. Instead, they had consistently been treated as personal in nature, and there were rights of privacy at issue if telephone conversations between two people had to be disclosed to third parties or to the public. For these reasons, I was of the opinion that these papers were personal rather than agency records.

In February, I raised the Freedom of Information Act questions with the Assistant Attorney General for the

Decontrolled under
5 FAM 900 et seq.
12/22/76 *MS*

Office of Legal Counsel at the Department of Justice. He concurred in my view that the pending Freedom of Information Act requests for the transcribed notes of your telephone conversations could properly be denied on the basis that they were not agency records.

Finally in March, I was called upon to review an appeal of the Department's denial of the initial Freedom of Information Act request for these papers. I advised the Department's Council on Classification Policy that there was "very strong support" for concluding that these papers are not agency records. Incidentally, I gave this advice despite an assumption that some of the transcriptions contained classified material. The Council on Classification Policy reviewed the requested papers and found that they did *not* contain classified information.

Independently of these formal occasions when my legal opinion was sought by bureaus of the Department, I have on several occasions discussed with you my view that you would be entitled to retain the transcribed notes of your telephone conversations when you leave office. The detailed basis for my opinion is the following:

1. The papers have been expressly designated and filed as personal from the time they were originated. Under Department of State regulations (5 FAM 417.1a), a retiring official may retain papers expressly designated or filed as personal from their time of origin or receipt.

2. The papers have not been circulated within any agency, but have been continuously held in your possession and in that of your immediate assistants. They were retained solely at your discretion as work aids to help you recall prior conversations and events. Recent authority support the view that such papers are personal rather than agency records. In *Porter County Chapter* v. *A.E.C.*, 380 F. Supp. 630 (N.D. Ind. 1974), certain handwritten notes and materials of A.E.C. staff members were sought under the Freedom of

Information Act. The Court concluded that since "such materials [were] not circulated to nor used by anyone other than the authors, and [were] discarded or retained at the author's sole discretion for their own individual purposes in their own files," the materials were "personal notes and not agency records." *Id.* at 633. The OMB guidelines on the Privacy Act are in accord. They state that the Privacy Act extends only to records under the control of an agency and not to "uncirculated personal notes, papers and records which are retained or discarded at the author's discretion and over which the agency exercises no control or dominion" — even if such materials are "in the possession of agency employees and used by them in performing official functions." 40 F.R. 28952 (1975).

3. The transcriptions that I reviewed in connection with the Freedom of Information Act requests did not contain any government decisions or policy actions. In the event that other transcriptions should reflect such decisions or actions, it is highly probable that they would have been incorporated in other papers at the time the decisions were implemented — and those latter papers would certainly have become government records. Nevertheless, as a precaution, you should review the papers. If any discussion of a significant government activity or decision is found, an extract or summary of it should be prepared and submitted to the appropriate records officials. This procedure is contemplated in the Department's regulations (5 FAM 432). Although technically these regulations apply only to "personal correspondence" and not to transcribed secretarial notes, the preparation of a summary or extract will assure that government records are complete.

4. There are expectations of privacy when two people have a telephone conversation. Although either party could well make a record of a conversation, one assumes that what was said will be revealed to others only at the discretion of the other party. Treating what was said as a

government or public record would violate these expectations.

5. The fact that the papers were retained for personal use, that they were not required to be prepared, that they have been consistently treated as personal, and that they contain personal and private matter, support the view that they are personal in nature. Similar factors were relied on in *United States v. First Trust Co. of St. Paul*, 251 F.2d 686 (8th Cir. 1958), on reaching a conclusion that private notes made on an official government expedition (the Lewis and Clark expedition) were personal papers and not government property of the United States.

6. The fact that these transcriptions were prepared by government-paid secretaries using government paper and typewriters is not, in my opinion, controlling, in view of the factors discussed in paragraphs 1 through 5 above. Moreover, it is accepted practice that senior officials who must devote extraordinary amounts of time to government duties may make use of government office resources to prepare private correspondence and other personal materials.

7. Whether future judicial decisions concerning the Nixon papers might have some effect on the notes of your telephone conversations cannot yet be determined. But I am of the view that the Presidential Recordings and Materials Preservation Act of 1974 does *not* apply to these transcribed notes because that statute on its fact applies to "the Presidential historical materials of Richard M. Nixon" and not to personal papers of individuals who served under him.

Today's article in the *Washington Post* suggests that a "U.S. court restraining order" in the Nixon papers litigation may apply to the transcribed notes of your telephone conversations. That court order, however, expressly applies only to "defendants" in that litigation and

"their superiors, agents and assigns." *Nixon* v. *Administrator of General Services*, 408 F. Supp. 321, 375 (D.D.C. 1976). Since you do not come within any of these categories, this court order does not apply to the transcribed notes of your telephone conversations.

In summary, it is my opinion that under Department of State regulations and other legal criteria, these particular papers are personal and may be retained by you when you leave office.

Monroe Leigh

[Attachment]

Kissinger Hints He's Ready for Talks on His Future

By Don Oberdorfer
Washington Post Staff Writer

One of the world's hot literary properties — Henry A. Kissinger — passed the word yesterday that he plans to meet with "a few people" in the coming weeks about his work after leaving public office.

This announcement, from spokesman Robert L. Funseth, superseded an earlier statement from the Secretary of State that he would consider it "improper" to discuss financial offers while still in government.

Nobody would identify the persons who Kissinger plans to meet about his future. However, friends said Kissinger expects to write a book within the next two or three years, and is exploring a quasi-independent role as an adviser and consultant, possibly combined with an academic appointment.

Kissinger may well go onto corporate boards of directors, according to one friend, but will definitely not take a government post. Those familiar with his thinking said there is

little chance he will accept reported offers to be a television commentator, considering such a post to be beneath the dignity of a former diplomatic wizard.

Former Under Secretary of State Carlyle E. Maw, who was Kissinger's personal lawyer before joining the government, said yesterday he has been accepting "offers, suggestions and proposals" on behalf of Kissinger in recent weeks, but that Kissinger has not yet given them his attention.

Maw confirmed that he received a number of proposals for a book, which is expected to be one of Kissinger's major activities — and a major source of income — in the next several years. However, the lawyer said he had seen no outline and that he does not believe Kissinger has started drafting. Maw, who returned to private law practice last September, denied a published report that Kissinger has named a literary agent.

A New York literary source said the Kissinger memoirs were considered to have potential as "a very big book of our time," though nobody knows what Kissinger would cover in his writings, or how frank or incisive he would be. This source said publishing houses have submitted offers over many months, with no response from agents of Kissinger except to receive the offers.

European publishers are said to be particularly enthusiastic about a Kissinger memoir. A rumor, subsequently denied, swept European literary circles last week that the book was to be put up for auction in London within a few days.

Because of Kissinger's extraordinary importance in the history of the present era and his highly personalized and secretive methods of operation, his files and recollections may be of great importance to his successors in government as well as extremely valuable to historians and the public.

Lawrence S. Eagleburger, Kissinger's executive secretary, said yesterday that the originals of Kissinger's government papers will rest in the files of the State Department or, in the case of papers generated during his tenure as presidential national security affairs assistant, in the White House. As with other retired secretaries of state, access to his State Department documents after his departure from government will be arranged, Eagleburger said.

Eagleburger said extensive "memoranda of conversations" covering talks between Kissinger and foreign and U.S. leaders are part of this official file.

However, he said Kissinger obtained a State Department legal adviser's ruling last January that secretarial notes of his telephone conversations are "personal papers" which may be taken with him when he leaves government.

Some of Kissinger's most important transactions with presidents and foreign leaders are believed to have taken place by telephone. Some private attorneys believe the records of telephone conversations monitored during the Nixon presidency may be covered by the U.S. court restraining order which requires public preservation of the Nixon papers.

According to State Department regulations, no papers which have not been explicitly designated or filed as personal at the time of origin or receipt may be removed when an official resigns.

The line between official records and personal papers is the subject of a memo, awaiting final clearance, which the National Archives and Records Service plans to send within a few days to all government departments.

Rep. Bella Abzug (D—N.Y.) chairman of the subcommittee on government information of the House Government Operations Committee, is reported to be considering

an appeal to have a moratorium on the removal of any papers by departing Ford administration officials until the ownership questions can be resolved and the removal of documents supervised by the National Archives and the subcommittee.

Eagleburger said yesterday he expects Kissinger to be "very conservative" in determining what might be of a personal nature. "If there is a question about it, it will stay here," Eagleburger said.

In all of his dealings with senior Chinese officials in Peking and some of his dealings with Soviet diplomats, Kissinger has departed from the traditional practice of utilizing his own interpreter, relying instead exclusively on interpreters supplied by the other sides. There have been reports that this was done by Kissinger for purposes of keeping dealings secret from the U.S. government bureaucracy and that no other U.S. official could be sure of what was said in some extremely important meetings.

Eagleburger quoted Kissinger yesterday as saying there was always a U.S. note-taker during his Chinese and Soviet conversations. Eagleburger said the use of Chinese rather than American interpreters in Peking was at Chinese insistence.

EXHIBIT 9

THE SECRETARY OF STATE
WASHINGTON

January 18, 1977

Dear Dr. Rhoads:

I write in response to your letter of January 4, in which you inquire about the donation of my papers to the United States for preservation at the Library of Congress and, in particular, about that portion of the donation that comprises the secretarial notes of my telephone conversations.

Apparently, there has been some misunderstanding or at least incomplete information concerning this donation. So that you may be apprised of what has occurred, I enclose a copy of a letter I have sent to the Chairman of the House Committee on Government Operations, which describes in detail the scope of the donation and the steps taken to assure completeness of Department of State records.

I also enclose a copy of a memorandum by counsel to the Department, which discusses several problem areas that might arise if the additional procedures contemplated in your letter were followed. With respect to the procedures which have been followed to date, I have requested the records officers of the Department to answer any further questions you may have concerning the steps taken.

Best Regards,

/s/ Henry A. Kissinger
Henry A. Kissinger

Enclosures:
as stated above

Dr. James B. Rhoads,
Archivist of the United States,
National Archives and Records Service.

THE SECRETARY OF STATE
WASHINGTON

Dear Mr. Chairman:

I write in response to your letters of January 3 and January 11, concerning the donation of my papers to the United States for preservation at the Library of Congress.

In confirmation of your conversation with the Deputy Under Secretary of State, Mr. Lawrence Eagleburger, I wish to reiterate the following details concerning the scope of the donation and the steps undertaken to assure the completeness of Department of State records.

First, all government papers that have been donated to the Library of Congress are copies and *not* original records. Documents officers have carefully reviewed all of these papers to make certain that all original or record copies are included in the appropriate files at either the Department of State, National Security Council, or White House, and that only copies have been included in the files that have been transferred to the Library.

Second, in addition to government papers, I have donated papers relating to my personal life, both before and during my years of government service. This portion of the donation includes, for example, papers from my years at Harvard University.

Third, I have donated under a separate instrument, the secretarial notes of my telephone conversations. These papers have been consistently treated as personal work aids. The special privacy considerations raised by these

The Honorable
Jack Brooks,
Chairman,
Committee on Government Operations,
House of Representatives.

notes are reflected in the separate instrument of gift. Counsel to the Department of State has thoroughly reviewed the applicability of Department of State regulations to these papers, and has advised that under these regulations and other legal authority, the papers are personal. The only copies of these papers are at the Library of Congress.

However, also pursuant to Department of State regulations, Deputy Under Secretary Eagleburger is at my direction reviewing these notes of telephone conversations and is extracting any significant government activity or decision that may be reflected in them. These extracts will be forwarded to the appropriate government offices or agencies for inclusion in government record files.

Both in executing and in implementing the donations to the Library of Congress, I have endeavored to follow in both letter and spirit the applicable Department of State regulations. I am advised that these regulations, which have been in effect since 1967 and which were promulgated pursuant to 44 U.S.C. 3101 and 3102, have been scrupulously followed with respect to my papers.

I wish to note that the Department's regulations serve a number of relevant policy considerations. They assure that the Department has continuing access to information needed for the conduct of foreign policy. They also respect privacy expectations in papers that have been consistently treated as personal. This aspect of the regulations has enabled numerous Department officials to originate candid diaries and notes which reflect their official activities and which have proved to be invaluable historical legacies. Although I am not in a position to make a similar claim for the minor portion of my papers that I have treated as personal, I am convinced that the policy reflected in the Department regulations of 1967 serves to promote candid accounts of government service which would not otherwise be created. Such accounts would certainly not be created if the accompanying privacy expectations did not continue to

be respected.

I wish to assure you, as I have assured others, that the Department of State will have complete records of the foreign policy actions and decisions in which I have participated as Secretary of State. With respect to the donations I have made, all of the papers in question are to be preserved for future scholars at an institution of unquestioned integrity, the Library of Congress. As you may know, the Library has preserved the papers of 27 other Secretaries of State. It is my sincere hope that when the donation is considered in this perspective, it will be viewed as a positive and responsible contribution.

Best regards,

Henry A. Kissinger

THE LEGAL ADVISER
DEPARTMENT OF STATE
Washington

January 14, 1977

MEMORANDUM

By a letter dated January 4, 1977 to Secretary of State Kissinger, the Archivist of the United States has inquired about Secretary Kissinger's donation of papers to the Library of Congress, and, in particular, about that portion of the donation consisting of secretarial notes of Secretary Kissinger's telephone conversations. The letter requests that GSA archivists be permitted to review these notes, so that they might make their personal assessments as to whether these notes consist of personal or agency records.

It appears that the request has not taken into account the following factors: (1) that the nature of the notes in question must, under present law, be determined according to the Department of State regulations; (2) that the Department's records interest is met by the "extract" requirement; (3) that the GSA is not an appropriate entity to review the notes, because of its advocate's interest in seeking a government-wide rule for distinguishing personal from official papers; (4) that other legal authority fully supports the policies reflected in the Department of State regulations; and (5) that Department policies would be prejudiced by the requested review. This memorandum discusses each of these points in detail.

1. Role of Department of State Regulations

Whether the notes in question are personal or official papers must, in the final analysis, be considered in light of the Federal Records Act, 44 U.S.C. 3101 *et. seq.*, and the Department of State regulations, promulgated under that Act. There is not under present law any carefully defined, government-wide legal standard for distinguishing personal from official papers. (Indeed the absence of such a government-wide standard is the reason why the present National Study Commission on Records and Documents of Federal Officials was created.) Instead, existing legislation leaves it to each federal agency to determine how records should be made and preserved, and to provide for "effective controls over the creation, maintenance and use of records." 44 U.S.C. 3101 and 3102.

Pursuant to this statutory authority, the Department of State in 1967 promulgated regulations concerning maintenance of records and, in particular, concerning what papers a retiring official may retain as personal. 5 FAM 417.1 and 432. Inasmuch as these Department regulations are controlling, it is the responsibility of Department of State officers, and not GSA archivists, to ascertain what steps are being taken to assure continuing Department access to information which may be reflected in the notes in question and which might be needed for the conduct of foreign policy.

2. The "Extract" Requirement

The Department's regulations establish a pragmatic test for determining what papers a retiring official may retain as personal. If a paper has been explicitly designated or filed as personal from the time of origin or receipt, it is considered to be personal and may be retained; on the other hand, if a paper has not been so designated or filed, or if it has been circulated within the agency, it is considered to be an agency record. 5 FAM 417.1. This working test for distinguishing personal from official papers attempts to respect, in a realistic fashion, privacy expectations that an individual Department employee or official may have with respect to a paper.

However, even though a paper may be considered personal, official policy matters discussed in such a paper must be extracted and forwarded for inclusion in Department records.

5 FAM 432. The Department has consistently construed this provision as requiring a departing official to extract any significant government activity or decision that may be reflected in such a paper. (Note that the very existence of an extract requirement is based on the premise that there are categories of personal papers which may and do contain discussions of official activities and that such discussions of official activities do not alter the personal nature of these papers.)

At present, the secretarial notes of Secretary Kissinger's telephone conversations are being reviewed at his direction, in order to ascertain which portions of them must be extracted for inclusion in appropriate foreign policy record files. In light of this review, it would be highly unusual if these same papers were to be subjected to a second review by persons unfamiliar with the current state of foreign policy. We would, of course, anticipate that in future years, when foreign policy records are normally reviewed within the State Department to determine whether they should be transferred and preserved at the National Archives, these extracts will also be reviewed for that purpose.

It should be noted that no statute required Secretary Kissinger to make and retain candid notes of telephone conversations. The only requirement is that significant government activities or decisions undertaken by a Secretary of State by telephone be reflected in government records. This requirement is being fully satisfied, so that the agencies of the United States Government concerned with the conduct of foreign policy will have the information needed for the conduct of foreign policy in coming years. Also, in the event that some of these extracts may pertain directly to the Nixon or Ford Presidencies (as opposed to National Security Council or Department of State business), they are to be forwarded for inclusion in the White House files for those periods.

3. GSA's Advocate's Interest

Recently, the GSA has espoused a view that personal papers are limited to material pertaining solely to an individual's private affairs, and not at all to his official activities. This view implies that traditionally personal materials (like diaries, notes and family correspondence) which discuss a person's official activities, are official records. The GSA advocated this position in proposed regulations under the Presidential Recordings and Materials Preservation Act, but it was expressly rejected twice by the Congress in the past year. S. Res. 428; H. Res. 1505; see H. Rep. No. 94-1485 of 4-5 (1976). This approach, among others, has also been suggested to the National Study Commission on Records and Documents of Federal Officials, which has the task of proposing for the first time, government-wide legislation on the personal-official paper distinction. In that forum, GSA is a proponent for a definition of official records that is inconsistent with Department of State regulations. In view of this advocate's interest, it would not seem appropriate for GSA archivists to preempt the Department of State by reviewing the notes in question.

We, of course, are aware of the recent GSA Bulletin FPMR B-65 (November 15, 1976), which undertakes to summarize existing law with respect to records. Significantly, the only paragraph in that "summary" that is not supported by a statutory citation is paragraph 3c, which advances the GSA's recent proposal on the distinction between official and private papers. In this regard, no provision of the GSA Federal Property Management Regulations of February 1967 contains so far-reaching a definition of official records as that contained in paragraph 3c of GSA Bulletin FPMR B-65.

4. Other Legal Authority

Recent judicial decisions have firmly supported the view, embodied in Department of State regulations, that per-

sonal papers can include discussions of official activities, *United States v. First Trust Co. of St. Paul*, 251 F.2d 686 (8th Cir. 1958), and that such personal records of official activity are not agency records, *Porter County Chapter v. A.E.C.*, 380 F. Supp. 630 (N.D. Ind. 1974). The same conclusion is set forth in the OMB Guidelines to the Privacy Act (40 F.R. 28952), which makes clear that "agency records" do not include "uncirculated personal notes, papers and records" — even if such materials are "in possession of agency employees and used by them in performing official functions."

Also, in the last government-wide pronouncement on what papers a retiring official may retain — Cabinet Paper CP-59-58-4, July 27, 1959 — it states that "since such work-aids as office diaries, logs, memoranda of conferences and telephone calls are usually reflected in actual agency records, such work-aids ordinarily can be removed."

In a related context, the Department last January received a Freedom of Information Act request relating to some of the notes in question. Before responding to the request, we consulted with the Office of Legal Counsel at the Department of Justice, which orally concurred in our position that the notes sought were not agency records subject to the Freedom of Information Act. Attached for reference is a recent Department of Justice press guidance concerning these events. I call attention to the conclusion that one of the grounds for denying the request "was that the request included documents which were not 'agency records' within the meaning of the Freedom of Information Act, 5 U.S.C. §552, but rather personal notes and records of Mr. Kissinger."

5. Prejudice to Department Interests

The Department of State regulations serve a number of important policy interests — in particular, access by the Department to full information needed for the conduct of foreign policy, and respect for privacy expectations which an individual may have in regard to a paper that has been

consistently treated as personal. It should be noted that the respect for privacy expectations implicit in the Department's regulations has enabled numerous Department officials to originate candid diaries and notes which have proved to be invaluable historical resources.

If present practices were changed so as to preclude an official's private papers from containing material concerning his conduct in office, these candid and intimate sources of history would not be created. And, of equal concern to the Department, matters that are currently set down on paper might cease to be recorded.

In summary, it is my view that the procedure contemplated in the Archivist's letter of January 4 would present a number of difficulties for the Department and the administration of its records policies.

/s/ Monroe Leigh
Monroe Leigh

Department of Justice Press Guidance (12/23/76):

The Department of Justice has received requests for copies of a formal legal opinion thought to have been issued by the Department concerning the ownership of secretarial notes of telephone conversations of Secretary of State Kissinger. No such opinion exists. Early this year, however, in accordance with normal practice, the Office of Legal Counsel of the Department was consulted informally with respect to the proposed denial of a Freedom of Information Act request which sought such material relating to certain of Mr. Kissinger's telephone conversations. On the basis of a general description of the material involved which included both transcribed and untranscribed notes, the Assistant Attorney General for the Office of Legal Counsel orally approved the propriety of denying the request on several grounds, one of which was that the request included documents which were not "agency records" within the meaning of the Freedom of Information Act, 5 U.S.C. §552, but rather personal notes and records of Mr. Kissinger.

EXHIBIT 10

Feb 11 1977

Honorable Henry A. Kissinger
1800 K Street, NW.
Washington, D.C. 20006

Dear Dr. Kissinger:

This is in reply to your letter of January 18.

In that letter you declined to permit professional archivists from the staff of the National Archives and Records Service to examine the transcripts or notes of telephone conversations which you have deposited with the Library of Congress. You included with your reply copies of your letter to the Honorable Jack Brooks, Chairman of the House Committee on Government Operations, and a January 14 legal memorandum from the Legal Adviser to the Department of State, Mr. Monroe Leigh.

While those enclosures add some information regarding the deposit of this material with the Library of Congress, they do not resolve the basic issue of whether some or all of the transcripts or notes are Federal records, Nixon historical materials, or personal papers.

Consequently, I am writing to you once again to enlist your cooperation in making it possible for qualified archivists from my staff to examine this material in order to make the necessary determinations. As I indicated in my letter of January 4, this work would be done by professional archivists who will protect any confidential information they may encounter. It is my intent to select for this purpose a small team of archivists experienced in diplomatic records, personal papers, and the appraisal of Federal records.

With regard to the legal issues involved and Mr. Leigh's memorandum, I enclose the opinion of the General Counsel of the General Services Administration. As you will

note, this opinion concludes that: "The Archivist of the United States has the authority and responsibility to make an independent determination of the character (federal records, Nixon historical materials or personal papers) of the telephone transcripts and related documents created or received by Former Secretary of State and Assistant to the President for National Security Affairs Henry A. Kissinger during the course of his service in those positions."

In view of this opinion and in order to resolve the basic issue expeditiously, I would appreciate it if you would make the necessary arrangements with the Librarian of Congress so that the members of my staff may have access to the materials in question.

Sincerely,

/s/ James B. Rhoads
JAMES B. RHOADS
Archivist of the United States

Enclosure

EXHIBIT 11

UNITED STATES OF AMERICA
GENERAL SERVICES ADMINISTRATION

Date: Feb 03 1977 *Officer of General Counsel*
Reply to *Washington, D.C. 20405*
Attn of: General Counsel — L

SUBJECT: Archival inspection of Kissinger telephone transcripts and related documents

TO: James B. Rhoads
Archivist of the United States — N

Pursuant to your request, this office has examined the legal questions posed by your request to the Honorable Henry A. Kissinger, former Secretary of State and Assistant to the President for National Security Affairs, that a team of archivists be permitted to inspect certain telephone transcripts and related documents, the former constituting the corpus of the most recent donation by Dr. Kissinger to the Library of Congress. In examining these questions, we have paid particular attention to the memorandum of law dated January 14, 1977, of then Department of State Legal Adviser Monroe Leigh, which was an enclosure to Dr. Kissinger's letter to you of January 18, in which he rejected your request for archival inspection.

FACTS

Recent news accounts, which have been confirmed by subsequent events, disclosed that former Secretary of State and Assistant to the President for National Security Affairs Henry A. Kissinger had his secretary transcribe certain of his telephone conversations that had taken place during the course of his service in these positions. These accounts further disclosed that Dr. Kissinger had concluded that these transcripts were his personal property and, accordingly,

that he could dispose of all or part of them as he chose to do. On December 24, 1976, Dr. Kissinger donated the only copy of these transcripts to the Library of Congress, pursuant to an instrument accepted by the Library which provides for lengthy and frequently indefinite periods of restricted access. Concerned that all or part of the transcripts might be federal records or Nixon historical materials rather than personal papers, you wrote to Dr. Kissinger on January 4, 1977, and requested that he permit a team of experienced archivists to inspect them and related documents, and subsequently issue a report to him on your findings. By a letter to you dated January 18, Dr. Kissinger, enclosing undated correspondence with the Honorable Jack Brooks, Chairman, House Committee on Government Operations, and a memorandum of law dated January 14, of then Department of State Legal Adviser Monroe Leigh, rejected your request for archival inspection of the transcripts and related documents. In his letter to Chairman Brooks, Dr. Kissinger stated that he had assigned then Deputy Under Secretary of State Eagleburger the task of making extracts of those portions of the transcripts which reflect "significant government activity or decision . . . . These extracts will be forwarded to the appropriate government offices or agencies for inclusion in government record files."

ISSUES

Does the Archivist of the United States have the authority and responsibility to make an independent determination of what documentary materials created or received by a cabinet officer in the course of his service in that capacity are federal records as defined in the Federal Records Act (44 U.S.C. 2101 *et seq.*)?

Does the Archivist of the United States have the authority and responsibility to make an independent determination of what documentary materials created or received by a

White House adviser to former President Nixon in the course of his service in that capacity are Presidential historical materials of the Nixon Administration as defined in Title I of the Presidential Recordings and Materials Preservation Act (P.L. 93-526; 88 Stat. 1695; 44 U.S.C. 2107 note), as implemented by the proposed public access regulations of the Administrator of General Services (40 CFR, Part 105-63)?

CONCLUSION

The Archivist of the United States has the authority and responsibility to make an independent determination of the character (federal records, Nixon historical materials or personal papers) of the telephone transcripts and related documents created or received by former Secretary of State and Assistant to the President for National Security Affairs Henry A. Kissinger during the course of his service in those positions.

DISCUSSION

I. There is one glaring oversight in the memorandum of law which accompanied Dr. Kissinger's rejection of your request for archival inspection of the telephone transcripts and related documents. It totally ignores any examination of the statutory and regulatory authorities and responsibilities of the Administrator of General Services, as delegated to the Archivist of the United States, which flow from the Federal Records Act and Presidential Recordings and Materials Preservation Act. Instead, the memorandum confines its examination of pertinent statutes and regulations to only that portion of the Federal Records Act which relates to the records management responsibilities of agency heads, as implemented by State Department regulations. (Throughout the entire memorandum there is no reference or discussion of Title I of the Presidential Recordings and Materials Preservation Act; hence, there is no consideration whatsoever of Nixon historical materials.)

Viewed in this limited perspective, the memorandum concludes that the responsibility for determining the character of the transcripts rests solely with the agency head, i.e., Dr. Kissinger. The heart of Mr. Leigh's rationale is expounded in one of his initial paragraphs:

> Whether the notes in question are personal or official papers must, in the final analysis, be considered in light of the Federal Records Act, 44 U.S.C. 3101 *et seq.*, and the Department of State regulations, promulgated under that Act. There is not under present law any carefully defined, government-wide legal standard for distinguishing personal from official papers. (Indeed the absence of such a government-wide standard is the reason why the present National Study Commission on Records and Documents of Federal Officials was created.) Instead, existing legislation leaves it to each federal agency to determine how records should be made and preserved, and to provide for "effective controls over the creation, maintenance and use of records." 44 U.S.C. 3101 and 3102.

Each of the sentences in this "definitive" paragraph contains a statement that is either erroneous or incomplete, or both. The first sentence implies that chapter 31 of title 44, United States Code, "Records Management by Federal Agencies", contains standards by which an agency head is instructed on making determinations of what documentary materials constitute federal records. To the contrary, there is no section of chapter 31 that provides this guidance. Indeed, the emphasis of the chapter reflects the oversight function of GSA and supports your request for archival inspection of the transcripts. For example:

> The head of each Federal agency shall establish and maintain an active, continuing program for the economical and efficient management of the

> records of the agency. The program, among other things, shall provide for . . . (2) *cooperation with the Administrator of General Services* in applying standards, procedures, and techniques designed to improve the management of records, *promote the maintenance and security of records deemed appropriate for preservation*, and facilitate the segregation and disposal of records of temporary value . . . .
>
> * * *
>
> The head of each Federal agency shall establish safeguards against the removal or loss of records he determines to be necessary *and required by regulations of the Administrator of General Services.*
>
> * * *
>
> The head of each Federal agency *shall notify the Administrator of General Services* of any actual, impending, or threatened unlawful removal, defacing, alteration, or destruction of records in the custody of the agency of which he is the head that shall come to his attention, and *with the assistance of the Administrator* shall initiate action through the Attorney General for the recovery of records he knows or has reason to believe have been unlawfully removed from his agency . . . .
>
> (44 U.S.C. 3102, 3105 and 3106, respectively)
> [Emphasis added.]

These sections of chapter 31 make it quite clear that every agency head shall operate the agency's records management program in full cooperation with and under regulations prescribed by GSA. To dismiss the oversight authorities and responsibilities of the Administrator, as delegated to the Archivist, is to ignore the plain reading of even this particular chapter of title 44.

The second sentence of the subject paragraph, which states that there are no carefully defined, government-wide standards under present law to distinguish federal records from personal papers, is, in our view, wholly erroneous. While we assume Mr. Leigh would argue that present standards are not "carefully defined," we believe the current definition of federal records, considered by the Congress as recently as October 21, 1976, provides a great deal of insight on a complex subject:

> "[R]ecords" includes all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them. Library and museum material made or acquired and preserved solely for reference or exhibition purposes, extra copies of documents preserved only for convenience of reference, and stocks of publications and of processed documents are not included. (44 U.S.C. 3301)

While there is no definition of "personal papers" in the Federal Records Act, NARS has issued government-wide standards concerning their scope for over 10 years, and as recently as November 15, 1976. Quite logically, the definition of "personal papers" is derived from the converse of the definition of federal records:

> The definition of official records involves materials made or received either in pursuance of

> Federal law or in connection with the transaction of public business. The definition of personal papers covers material pertaining solely to an individual's private affairs. In other words, correspondence, designated "personal," "confidential," or "private," etc., but relevant to the conduct of public business, is nonetheless an official record subject to the provisions of Federal law pertinent to the maintenance and disposal of such records. Official records are public records and belong to the office rather than to the officer. (GSA Bulletin FPMR B-65, Para. 3(c), November 15, 1976)

Given a subject matter as complex as federal records, it would be foolish to suggest that every document created or received by a federal official falls neatly in one category or another. But it is the very existence of a "gray area" that argues so strongly for the input of professional archivists in the decision-making process. These archivists within NARS are the persons most experienced in applying the criteria (subject matter, adequacy of alternative documentation, circulation, etc.) necessary for making these determinations.

In addition to the standards pertinent to federal records, there are also standards pertinent to the Presidential historical materials of the Nixon Administration. This subject, while ignored in the Leigh memorandum, is most important to the proper disposition of those transcripts created in the course of Dr. Kissinger's service as Assistant to the President for National Security Affairs. Title I of the Presidential Recordings and Materials Preservation Act requires the Administrator of General Services to

> receive, retain, or make reasonable efforts to obtain complete possession and control of all papers, documents, memorandums, *transcripts*, and other objects and materials which constitute

the Presidential historical materials of Richard M. Nixon . . . .

The Administrator is further instructed to

> issue at the earliest possible date such regulations as may be necessary to assure the protection of the tape recordings and other materials . . . from loss or destruction . . . .
>
> (Sections 101(b)(1) and 103, respectively, of the Presidential Recordings and Materials Preservation Act, P.L. 93-526, 88 Stat. 1695, 44 U.S.C. 2107 note)
> [Emphasis added.]

Pursuant to this authority, GSA has proposed regulations which include definitions of Nixon "Presidential historical materials", which must remain in or be transferred to the custody and control of the Administrator, and "private or personal materials", which are to be returned to former President Nixon or the member of his staff having a proprietary interest in them.

> The term "Presidential historical materials" . . . shall mean all papers, correspondence, documents, pamphlets, books, photographs, films, motion pictures, sound and video recordings, machine-readable media, plats, maps, models, pictures, works of art, and other objects or materials made or received by former President Richard M. Nixon *or by members of his staff* in connection with his constitutional or statutory duties or political activities as President and retained or appropriate for retention as evidence of or information about these duties and activities. Excluded from this definition are documentary materials of any type that are determined to be the official records of an agency of the Government; private or personal materials; stocks of

> publications, processed documents, and stationery; and extra copies of documents produced only for convenience of reference, when they are clearly so identified.
>
> The term "private or personal materials" shall mean those papers and other documentary or commemorative materials in any physical form relating solely to a person's family or other non-public activities, including private political association, and having no connection with his constitutional or statutory duties or political activities as President *or as a member of the President's staff.*
>
> (41 CFR §105-63.104(a) and (b), respectively, as most recently transmitted to the Congress on April 13, 1976)
> [Emphasis added.]

It should be noted that elsewhere in Mr. Leigh's memorandum, where he states that GSA advocates too narrow a definition of personal materials, he cites the Congress' rejection of the latter definition as support for his contention. Contrary to his implication that the Congress does not support this narrow view of personal materials, the Congress has rejected this definition because it deems the proposed definition too broad. In particular, the House of Representatives has rejected the definition because of the inclusion of the phrase, "including private political association," in describing those materials which are private or personal.

The third sentence of the pertinent paragraph states that the Congress created the National Study Commission on Records and Documents of Federal Officials in an effort to clarify the definitions of official records and personal papers. This is a clear misstatement of the basic purpose of the so-called Public Documents Commission. As you are so

keenly aware, the Congress created the Commission in the aftermath of the "Nixon-Sampson Agreement", which concerned the ultimate disposition of the Presidential materials of the Nixon Administration, and had nothing to do with federal records. There is nothing in the language of Title II of the Presidential Recordings and Materials Preservation Act (44 U.S.C. 3315 *et seq.*) or its legislative history which focuses the Commission's attention to an overhaul of existing statutes which regulate access to and the disposition of federal records, notably the Federal Records Act, the Freedom of Information Act and the Privacy Act of 1974. While there is a great deal of law pertinent to the disposition of federal records, there is almost no law pertinent to the disposition of the papers of constitutional office-holders. The primary purpose of the Public Documents Commission is to examine this dearth of law and to make recommendations to the Congress on the scope of remedial legislation.

The final sentence of the subject paragraph reiterates the memorandum's conclusion that it is within the sole province of each agency "to determine how [its] records should be made and preserved." In addition to those sections of chapter 31 cited above, this analysis again ignores those other portions of the Federal Records Act which establish the oversight authority and responsibility of the Administrator, as delegated to the Archivist. For example:

> When the Administrator finds that a provision of chapter 21, 25, 27, 29, *or 31* of this title has been or is being violated, he shall inform in writing the head of the agency concerned of the violation and make recommendations for its correction. Unless corrective measures satisfactory to the Administrator are inaugurated within a reasonable time, the Administrator shall submit a written report of the matter to the President and the Congress.
> (44 U.S.C. 2111(b)) [Emphasis added.]

In the present instance you are aware of a possible violation falling within your area of responsibility. You have informed the agency head of your concern, and have recommended an archival inspection of the subject transcripts and related documents as a means of aiding in the resolution of the dispute. These actions are clearly within the purview of section 2111(b), quoted above. If you deem Dr. Kissinger's rejection of your request an unsatisfactory corrective measure, ultimately it is encumbent upon you to report thereon to the President and the Congress. In the interim, pursuant to section 3106 of title 44, quoted above, you might also refer the matter to the Attorney General for such action as he deems appropriate.

In like manner, section 2906 of title 44 authorizes the Administrator to "inspect the records or the records management practices and programs of any Federal agency" for the purpose of recommending improvements in those practices and programs. It is important to note that records management is elsewhere defined (44 U.S.C. 2901(2)) to include records disposition.

II. As an affirmative basis for the determination by Dr. Kissinger that the transcripts are personal, the Leigh memorandum cites a State Department records management regulation which provides a clear standard for distinguishing federal records from personal papers:

> The Department's regulations establish a pragmatic test for determining what papers a retiring official may retain as personal. If a paper has been explicitly designated or filed as personal from the time of origin or receipt, it is considered to be personal and may be retained; on the other hand, if a paper has not been so designated or filed, or if it has been circulated within the agen-

cy, it is considered to be an agency record.

This regulation is apparently derived from a provision of the Federal Property Management Regulations:

> Papers of a private or nonofficial character *which pertain only to an individual's personal affairs* that are kept in the office of a Federal official will be clearly designated by him as nonofficial and will at all times be filed separately from the official records of his office.
> (41 CFR §101-11.202-2(d)) [Emphasis added.]

The distinction between the internal State Department directive and the government-wide FPMR, which dates from February 1967, is striking. When the Leigh memorandum later states that your directive of November 15, 1976, is the first time NARS established "so far-reaching a definition of official records," the author apparently overlooked this precedent going back over 10 years.

Further, while the State Department regulation is certainly "pragmatic" to the extent it minimizes the "gray area", we suggest that, in limiting the applicable criteria to the document's designation, filing and/or circulation, it is invalid. Even though each of these criteria is important in determining the distinction between federal records and personal papers, a federal official may not conclusively establish a document as a personal paper, although its subject matter relates to official business, by merely designating it as personal, filing it separately, or withholding it from circulation. Were that the intent of Congress in enacting the Federal Records Act, the Freedom of Information Act, and related legislation, some of the most significant documents reflecting the conduct of public business would never be subject to public scrutiny.

The State Department regulations appear to recognize this discrepancy. As explained in the Leigh memorandum, the remedy is sought in an extraction requirement:

> However, even though a paper may be considered personal, official policy matters discussed in such a paper must be extracted and forwarded for inclusion in Department records. [Cite omitted.] The Department has consistently construed this provision as requiring a departing official to extract any significant government activity or decision that may be reflected in such a paper.

This particular regulation is apparently derived from a second proviso of FPMR 101-11.202-2(d):

> In cases where matters requiring the transaction of official business are received in private personal correspondence, the portion of such correspondence that pertains to official business will be extracted and made a part of the official files . . . .

Again there is a clear distinction between the extraction standard established in the government-wide FPMR and that standard established internally at the State Department, at least as that regulation is interpreted by the Leigh memorandum. While the FPMR requires the extraction of "the portion . . . that pertains to official business," the State Department standard requires the extraction of only "any significant government activity or decision." Conceivably, in some instances an extraction performed under State Department standards may be synonymous with an extraction performed under FPMR standards. But at the same time it is reasonable to conclude that in many instances the extraction of information about "significant government activity or decision" will encompass less material than information "that pertains to official business." These differing standards highlight the rationale of archival review and oversight.

There is another significant aspect to the affirmative reliance on the State Department regulations in the Leigh memorandum. Inasmuch as these regulations are ap-

parently derivatives of the Federal Property Management Regulations, they represent the delegation of government-wide records management authority vested in the Administrator to the Secretary of State for purposes of managing State Department records. It is a maxim of the law of agency that the principal, i.e., the Administrator (or in this instance the Archivist), may revoke fully or partially the authorities delegated to the agent, i.e., the Secretary of State. Your request to Dr. Kissinger is consonant with this maxim.

III. The myriad quotations and citations of statutes and regulations make unequivocal the oversight authority and responsibility of the Administrator of General Services, as delegated to the Archivist of the United States, in resolving the questions which have arisen concerning the disposition of the Kissinger telephone transcripts. There are, however, certain other points raised in Mr. Leigh's memorandum which warrant our attention. First, on page 3 he states: "It should be noted that no statute required Secretary Kissinger to make and retain candid notes of telephone conversations." While we reserve judgment on the question of whether any statute requires their retention pending the resolution of their character, we call into question the significance of the fact that no statute mandated their creation. With rare exception, this is true of any particular documents we call federal records. The significance to the custodial agency and GSA is not that they didn't have to be created, but that they were created. Given the fact of their creation and existence, they may be disposed of only in accordance with applicable statute and regulation (44 U.S.C. 3314).

Second, the memorandum rejects GSA intervention because of a disqualifying advocate's interest in the ultimate resolution of the controversy. This is a patently absurd reason for rejecting your request. Your interest in the matter derives from your statutory authorities and responsibilities over the subject matter. That your conception of the scope of personal papers might differ from that of Dr. Kissinger has absolutely no bearing on your authority and responsibility to intervene.

Third, the memorandum cites an oral opinion of the Justice Department's Office of Legal Counsel that the transcripts in question are not federal records. In subsequent conversations between attorneys in this office and the officials in the Office of Legal Counsel who were instrumental in issuing that opinion, we have learned that the issue presented that office by the State Department concerned a Freedom of Information request for access to certain transcripts created by Dr. Kissinger in his capacity of Assistant to the President for National Security Affairs. Because the "White House Office" is specifically excluded from the definition of agencies subject to the FOIA, these transcripts were logically determined not to be records subject to the FOIA. Of course, such an opinion does not confront the issues of whether the transcripts created in the course of Dr. Kissinger's service in the Nixon White House are Nixon historical materials, or if the transcripts created in the course of his service as Secretary of State are federal records.

Finally, we touch on the question of the potential harm caused by archival examination of what are truly personal materials. While conceding the possibility of some invasion of the privacy of Dr. Kissinger or certain of the persons with whom he was speaking, we believe this threat is far outweighed by the public interest served by archival inspection. It is also noted that the instrument deeding these transcripts to the Library of Congress incorporates a provision for access to the transcripts by approved Library of Congress employees during their period of restriction. If these federal librarians or archivists can be so entrusted with access to the transcripts, we question the logic in the exclusion of archivists employed by NARS. To be sure, a

three-judge panel of the United States District Court for the District of Columbia has recently recognized the "unblemished record" of GSA archivists for protecting individual privacy while rejecting former President Nixon's contention that archival inspection of his materials will result in an unconstitutional invasion of his privacy. (*Nixon v. Administrator of General Services*, 408 F. Supp. 321, 365-67 (D.D.C. 1976), *probable jurisdiction noted*, Supreme Court of the United States (No. 75-1605, November 29, 1976)).

RECOMMENDATION

This office recommends that you renew your request for archival inspection of the transcripts and related documents to Dr. Kissinger, providing a copy of your request to the present Secretary of State. Should your request be rejected or go unanswered, we recommend consultation with appropriate officials of the Department of Justice in determining your next course of action.

/s/ Donald P. Young
DONALD P. YOUNG
General Counsel

EXHIBIT 12

THE LIBRARY OF CONGRESS
Congressional Research Service
Washington, D.C. 20540

January 19, 1977

TO: H. Subcommittee on Government Information, and Individual Rights

Attention: Timothy H. Ingram
Staff Director

FROM: American Law Division

SUBJECT: Public Ownership of Secretarial Telephone Transcripts of the Secretary of State

This memorandum is in response to your request for our legal opinion concerning the ownership of the secretarial transcripts of the telephone conversations of Dr. Henry A. Kissinger during his service from 1969 through 1977 as National Security Assistant to the President and as Secretary of State. Specifically, it is asked whether these documents are the personal property of Dr. Kissinger or the public property of the United States Government.

On December 28, 1976, the Secretary of State announced that the transcriptions would be donated to the Library of Congress under a separate deed of gift from that governing the remainder of his papers. In general, access to all documents will be restricted for twenty five years, or until five years after the death of Dr. Kissinger, whichever is later. Access to the telephone transcripts is subject to a further limitation: if one of the parties to the conversation is still living when the papers become available for public access, the consent of that party must first be secured.

There are two leading cases on the issue of the ownership of papers and documents produced by public officials during their tenure in office. *United States v. First Trust Company of St. Paul,* 146 F. Supp. 652 (D. Minn., 1956), *aff'd* 251 F.2d 686 (8th Cir. 1958) (hereinafter cited as *"Saint Paul"*), and *Public Affairs Associates v. Rickover,* 177 F. Supp. 601 (D.D.C. 1959), *rev'd in part,* 284 F.2d 262 (D.C. Cir., 1960), *judgment vacated,* 369 U.S. 111 (1962), *remanded for new trial* 268 F. Supp. 444 (D.D.C. 1967) (hereinafter cited as *Rickover*).

The *Saint Paul* case was an action to quiet title to certain notes made by William Clark during the Lewis and Clark expedition through the Louisiana Territory in 1803. After the notes had been discovered by chance in 1952, the United States intervened to assert its title to them. The trial court ruled against the Government and the Court of Appeals affirmed. The Court of Appeals, however, stated the general principle that if Clark's notes were the written records of a government officer executed in the discharge of his official duties, then they would be public documents and ownership would be in the United States, 251 F.2d at 688. The ruling of the court was thus based on an examination of the circumstances in which the notes were written.

During the expedition, William Clark was second in command to Meriwether Lewis. President Jefferson had instructed Lewis in great detail to make and preserve a record of his observations, but made no mention of others in the party keeping an official record, diary, or notes. Lewis did keep a record, apparently in accord with Jefferson's instructions. Clark's notes did contain much observational data, but they also contained a great many personal and private notations not found in notes of an official character or in an official record. Other members of the expedition kept diaries and notes which the government had never claimed. Lewis at one point sent Jefferson a copy of Clark's

"private journal" for his own perusal, but not as an official document of the expedition. In the light of these and other similar factors, the courts ruled that the notes were the private and personal writings of Clark, unofficial in character, and therefore not the work product of a government representative engaged in the performance of his duties, 251 F.2d at 690.

The question of the literary rights of a public official in his speeches was litigated in the *Rickover* case, which consumed more than eight years in the courts. The original trial court held that a Government official has a literary property right in writings or speeches which have some bearing on, or arise out of his official actions, as long as the writing or delivery of the work is no part of his official duties. Literary products in this category remain the property of the author to the extent that they are protected by the common law and by the law of copyright, and his rights are not affected by the fact that he is a Government officer or employee, 177 F. Supp. at 604.

The trial court was reversed by the Court of Appeals on the grounds that the distribution of copies of the speeches placed them in the public domain before the copyright had been obtained, thereby forfeiting the copyright, 284 F.2d 262. The Supreme Court, however, vacated this judgment because of inadequate record, and remanded for a new trial, 369 U.S. 111.

In the *Rickover* case, on remand, the court stated that the fundamental determination in resolving the ownership issue was whether the disputed speeches fell within the purview of Admiral Rickover's official duties. Those duties, the court said, were a matter of contract between the Admiral and the Navy Department. The court noted the broad authority vested in Rickover as head of the nuclear propulsion program, and his power to act in a variety of ways not enumerated in his position description. In this context, the court ruled, "the duties of a high Government

official should not be narrowly interpreted. Consequently, *the circumstances of the preparation and delivery of the speeches and the speeches themselves must be examined to determine whether the Admiral was acting in his public or his private capacity.*" 268 F. Supp. at 448-49 (emphasis added).

In resolving the ownership of the Rickover speeches, the court relied on the following factors: the invitations to speak were extended to Rickover in his private capacity; the speeches were prepared at his home; "purely mechanical operations" were performed when the final manuscript was typed and duplicated on Navy facilities by the Admiral's administrative assistant; the duplication was in part for the official purpose of obtaining security review and in part for the unofficial purpose of providing copies to press and public; copyright notice was in his own name, without official title; the speeches were delivered on his own time. In short, the court ruled, both speeches were handled as private business from start to finish. 268 F. Supp. at 449.

Under the principles set forth in the *Rickover* and *St Paul* cases, if the transcripts are the written records of a government officer executed in the discharge of his official duties, they are public documents and ownership is in the United States. Whether the transcripts were prepared in the Secretary's public or private capacity must be determined by an examination of the circumstances of the preparation and delivery of the transcripts and an examination of the transcripts themselves.

An examination of the transcripts themselves is not within the scope of this report. Moreover the circumstances surrounding their preparation are not clear. The State Department, however, has indicated that monitoring of telephones is prohibited except for the most limited circumstances. The one exception is to permit a third party to listen to the telephone conversations of the "senior principle officers" of the Department "for the purpose of taking notes or making appointments or to improve the

general efficiency of operations." According to the Department, the Federal Property Management Regulations (FPMR) permit monitoring "only when an exception to the general prohibition is deemed absolutely necessary to the conduct of business." Letter from Kempton B. Jenkins, Acting Assistant Secretary for Congressional Relations, Department of State to: The Honorable Bella S. Abzug, Chairwoman, Government Information and Individual Rights Subcommittee, House of Representative, October 7, 1976, citing FPMR 101-35.308.

If regulations permit monitoring only when deemed "absolutely necessary for the conduct of business," then the conversations must have been part of the official duties of the Secretary of State. The transcripts of those conversations would therefore relate to the Secretary's public rather than private capacity. Under the *Rickover* and *St Paul* rule, materials produced by an official in the discharge of his official duties are the public property of the United States rather than the personal property of the official.

On the basis of the above described FPMR provisions and State Department's regulations, and on the authority of the *Rickover* and *St Paul* cases, we are compelled to conclude that the ownership of the secretarial transcripts in question is vested in the United States Government rather than Secretary Kissinger.

It should be noted that public ownership of the transcripts does not necessarily mean that they are "records" or "agency records" within the meaning of the Federal Records Act, the Freedom of Information Act, or the Privacy Act. The status of the manuscripts must be determined independently under each of those laws.

/s/ Vincent E. Treacy
Vincent E. Treacy
Legislative Attorney

EXHIBIT 13

DEPARTMENT OF STATE
Washington, D.C. 20020

October 7, 1976

Dear Mrs. Abzug:

Our study has now been completed and the Secretary has asked me to reply to the questions contained in your letter of July 14 on the telephone monitoring practices of the Department of State. Basically, the Department is subject to the Federal Property Management Regulations (FPMR 101-35.308). Your specific questions are answered as follows:

1. Q: Does the agency presently permit monitoring of incoming or outgoing telephone calls? (for the purpose of this inquiry, "Monitoring" includes, but is not limited to, a secretary or any third person listening in on the line, either covertly or overtly.)

   A: The Department *prohibits* the monitoring of telephone calls except for the most limited purposes.

   1a). Q: For what purpose and under what circumstances does monitoring occur?

   A: The only exception to the general prohibition is to permit a third party to listen to the telephone conversations of the senior principal officers of the Department for the purpose of taking notes or making

The Honorable
Bella S. Abzug, Chairwoman,
Government Information and
Individual Rights Subcommittee
House of Representatives

appointments and to improve the general efficiency of operations. This is done only at the express request of the officer — whose calls are those being monitored.

1b.) Q: Do agency employees consent to monitoring of their telephone conversations and, if so, are their consents given in writing?

A: Again, employees' telephone conversations are not monitored; this is prohibited by the Department. In accordance with the provisions of FPMR 101-35.308, monitoring is permitted only when an exception to the general prohibition is deemed absolutely essential to the conduct of business. Only principals have been permitted to have a monitoring device; in such cases the exception has been granted at his own request to monitor his own telephone conversations.

1c.) Q: To what extent are the employees and outside callers aware of the presence of another party on the line?

A: As noted above, monitoring occurs only in the most limited circumstances. In some of these cases, the other party may not be aware that the call was being monitored.

2. Q: Is tape recording of telephone conversations on the agency's lines presently permitted? If so, do any warning or consent requirements accompany or limit this practice?

A: Only in its Operations Center does the Department have equipment for taping telephone conversations. Activation of this equipment is permitted in only two cases: 1) when an incoming caller requests that his conversation be recorded for later transmission to a third party; 2) in the event of a threatening call such as a bomb threat or warning of terrorist attack. The equipment operates without any "beep" or warning device, since it is used only when the calling party has voluntarily requested its use or in instances when criminal activity is suspected.

3. Q: Does the agency take any measures to minimize its listening time to portions of conversations which are relevant to the purposes of the monitor?

A: Monitoring is authorized only when the principal determines that monitoring by the third party is relevant or necessary to the transaction of business.

4. Q: Are there any regulations controlling the agency's telephone monitoring practices? If so, please include a copy with your reply. Is the agency affected by any general regulations issued by the General Services Administration, the Office of Telecommunications Policy, or the Federal Communications Commission? If so, please cite the regulations.

A: As noted above, the Department is subject to the provisions of the Federal Property Management Regulations (FPMR 101-35.308.)

5. Q: Under what statutory authority does the agency monitor the telephone conversations of its employees and outside callers?

A: Once again, the Department does not monitor the telephone conversations of its employees. The limited monitoring of outside calls described in 2 above, of course, is not done pursuant to specific statutory authority but under the general authority of the Department to conduct its business.

6. Q: Does the agency employ any automatic devices which record dialing impulses or observe service quality? Does use of this equipment fall within the agency's definition of telephone monitoring?

A: The Department of State does not have any equipment which records dialing impulses or observes service quality.

7. Q: What does the agency do with information regarding illegal activity which comes into its hands in the course of telephone monitoring for service or supervisory purposes?

A: The Department of State does not monitor telephone calls for service quality or supervisory purposes.

8. Q: Do the agency's practices ever conflict with State or Federal law? Where and when has this occurred? In the event of a conflict between State and Federal law, which law controls the agency?

A: We are not aware of any instance in which the Department's practices have been in conflict with state or federal law.

9. Q: Does AT&T service the agency's monitoring equipment? Does any AT&T policy constrain the agency's monitoring practices? Do you have

any reason to believe that AT&T has ever participated in any independent or outside monitoring of the agency's lines?

A: The small amount of telephone monitoring equipment at the Department is the property of the C&P Telephone Company and was installed and is maintained by their service representatives. The Department of State has agreed in writing to abide by the regulations of the C&P Telephone Company regarding the operation of these devices. These regulations are based upon applicable FCC regulation. The Department is not aware of any monitoring of the agency's lines by AT&T.

10. Q: Does the agency receive requests to monitor pursuant to court order or for national security purposes? How often has this occurred in the past 10 years, and to what extent does the agency comply with these requests?

A: We are not aware of any instance in which the Department has received a request to monitor calls pursuant to court order or for national security purposes.

I hope that these answers are responsive to your questions.

Sincerely yours,

/s/ Kempton B. Jenkins
Kempton B. Jenkins
Acting Assistant Secretary
for Congressional Relations

EXHIBIT 14

UNITED STATES OF AMERICA
DEPARTMENT OF STATE

DEPARTMENT NOTICE

To All Employees
State, AID, USIA, ACDA

January 24, 1977

Monitoring or Recording of Conversations

Secretary Vance has issued the following instructions:

No officer or employee of the State Department or the Foreign Service shall direct, arrange for, permit, or undertake the monitoring or mechanical or electronic recording of any conversation, including any telephone conversation, without the express consent of all persons involved in the conversation. Any deviation from this rule must be approved in advance by me or my Deputy.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, et al.,
Plaintiffs.,
v.
Civil Action No. 77-0220

CYRUS R. VANCE, et al.,
Defendants.

_____/

ANSWER OF DEFENDANTS VANCE AND BOORSTIN TO AMENDED COMPLAINT

Defendants Cyrus R. Vance and Daniel J. Boorstin, by their undersigned attorneys, (referred to hereafter as defendants) for their answer to the Amended Complaint, admit, deny and otherwise aver as follows:

First Defense

Plaintiffs lack standing to maintain the action.

Second Defense

Cyrus R. Vance is not a proper party to the action.

Third Defense

In answer to the numbered paragraphs of the complaint, defendants Vance and Boorstin admit, deny and otherwise aver as follows:

1. Deny as plaintiffs' characterization of their Amended Complaint.

2. Deny as conclusions of law, except that defendants admit that the documents at issue are now located within the District of Columbia and that acts alleged in the complaint transpired within the District of Columbia and that the

defendants are found within and are subject to service of process in the District of Columbia.

3. Deny for lack of knowledge or information sufficient to form a belief.

4. Deny for lack of knowledge or information sufficient to form a belief.

5. Deny for lack of knowledge or information sufficient to form a belief.

6. Deny for lack of knowledge or information sufficient to form a belief, except defendants admit that plaintiff James MacGregor Burns is Woodrow Wilson Professor of Political Science at Williams College and President-elect of the American Political Science Association, and that he has studied Presidential papers.

7. Deny for lack of knowledge or information sufficient to form a belief, except to admit that plaintiff Nat Hentoff is a writer.

8. Deny for lack of knowledge or information sufficient to form a belief, except to admit that plaintiff Donald G. Herzberg is Dean of the Graduate School of Georgetown University and Professor of Government, and that he was Executive Director of the Presidential Commission on Registration and Voting Participation.

9. Deny for lack of knowledge or information sufficient to form a belief, except to admit that plaintiff William Leuchtenburg is DeWitt Clinton Professor of American History at Columbia University and that he has done research in Presidential archives, and has written books and articles.

10. Deny for lack of knowledge or information sufficient to form a belief, except to admit that plaintiff Arthur Link is Edwards Professor of American History at Princeton University and Director of the Woodrow Wilson papers there and that he is an author.

11. Deny for lack of knowledge or information sufficient to form a belief, except to admit that plaintiff J. Anthony Lukas has been employed as a writer.

12. Deny for lack of knowledge or information sufficient to form a belief, except to admit that plaintiff Austin Ranney is Professor of Political Science at the University of Wisconsin and President of the American Political Science Association.

13. Deny for lack of knowledge or information sufficient to form a belief, except to admit that plaintiff Clement E. Vose is John E. Andrus Professor of Government at Wesleyan University and aver that he is a representative of the American Political Science Association to the Archives Advisory Counsel of the National Archives and Records Service.

14. Deny for lack of knowledge or information sufficient to form a belief, except to admit that plaintiff William Safire is a columnist for the New York Times and that he was an assistant to the President from 1969 through a portion of 1973.

15. Deny for lack of knowledge or information sufficient to form a belief.

16. Deny as conclusions of law, except to admit that defendant Cyrus R. Vance is the Secretary of State and, in his official capacity, is responsible for the actions of the Department of State, including actions pursuant to the Freedom of Information Act, 5 U.S.C. §552.

17. Deny as conclusions of law, except to admit that defendant Daniel J. Boorstin is the Librarian of Congress and that in his official capacity defendant Boorstin executed agreements with defendant Kissinger, to which reference is made in the complaint, and to aver that the Library of Congress currently has custody of the transcribed Secretarial notes that are the subject of this action.

18. Deny except to aver that defendant Kissinger was assistant to the President for National Security Affairs from approximately January 20, 1969 until approximately November, 1973 and that he became Secretary of State in September, 1973, that the documents at issue in this action are the transcribed secretarial notes of defendant Kissinger's telephone conversations during the time he held those positions and that the Library of Congress now has custody of those notes.

19. Deny for lack of knowledge or information sufficient to form a belief.

20. Deny for lack of knowledge or information sufficient to form a belief.

21. Deny for lack of knowledge or information sufficient to form a belief, except to admit that certain transcripts of conversations, or portions thereof, of defendant Kissinger were prepared by Government employees on Government time and with the aid of equipment and material of the Government during the period when defendant Kissinger served as Assistant to the President for National Security Affairs and Secretary of State.

22. Deny for lack of knowledge or information sufficient to form a belief except to admit that the transcribed notes were held by the Department of State at one time.

23. Deny for lack of knowledge or information sufficient to form a belief.

24. Deny for lack of knowledge or information sufficient to form a belief.

25. Deny for lack of knowledge or information sufficient to form a belief.

26. Deny for lack of knowledge or information sufficient to form a belief.

27. The allegations of paragraph 27 of the complaint are conclusions of law and not allegations of fact to which an

answer is required, but insofar as an answer is deemed required, they are denied.

28. The allegations of paragraph 28 of the complaint are conclusions of law and not allegations of fact to which an answer is required, but insofar as an answer is deemed required, they are denied.

29. Deny for lack of knowledge or information sufficient to form a belief.

30. Deny as an incomplete characterization of Exhibit A to the Amended Complaint, except to admit that Exhibit A to the complaint is a Deed of Gift and Agreement entered into on November 12, 1976 by defendants Kissinger and Boorstin.

31. Deny as an incomplete characterization of Exhibit A to the complaint, to which the Court is respectfully referred for a full and complete statement of its terms.

32. Deny as an incomplete characterization of Exhibit A to the complaint, to which the Court is respectfully referred for a full and complete statement of its terms.

33. Deny as an incomplete characterization of Exhibit A to the complaint, to which the Court is respectfully referred for a full and complete statement of its terms.

34. Deny as an incomplete characterization of the memorandum referred in paragraph 34 of the complaint, except to admit that Exhibit B to the complaint is an authentic copy of a memorandum prepared by Monroe Leigh, then Legal Advisor of the Department of State, dated November 11, 1976.

35. Deny as an incomplete characterization of Exhibit C to the complaint, except to admit that Exhibit C to the complaint is an authentic copy of a Deed of Gift and Agreement entered into by defendants Kissinger and Boorstin, dated December 24, 1976, and the Court is respectfully referred to Exhibit C to the complaint for the full and

accurate terms of the agreement.

36. Deny as an incomplete characterization of the contents of Exhibit C to the complaint, to which the Court is respectfully referred for a full and complete statement of the provisions thereof.

37. Deny as an incomplete characterization of the contents of Exhibit C to the complaint, to which the Court is respectfully referred for a full and complete statement of the provisions thereof.

38. The allegations of paragraph 38 of the complaint are conclusions of law to which no answer is required but, insofar as an answer is deemed required, they are denied.

39. The allegations of paragraph 39 of the complaint are conclusions of law to which no answer is required but, insofar as an answer is deemed required, they are denied.

40. The allegations of paragraph 40 of the complaint are conclusions of law to which no answer is required but, insofar as an answer is deemed required, they are denied.

41. Deny except to admit that Exhibit D to the complaint is an authentic copy of a letter dated January 4, 1977 to defendant Kissinger from the Archivist of the United States and defendants respectfully refer the Court to Exhibit D to the complaint for the complete provisions of said letter.

42. Deny as an incomplete and inaccurate characterization of the letter attached to the complaint as Exhibit E, except to admit that Exhibit E to the complaint is an authentic copy of a memorandum dated January 14, 1977 from Monroe Leigh and that defendant Kissinger did not accede to the Archivist's request, as reflected in a letter dated January 18, 1977.

43. Deny as an incomplete statement of the contents of Exhibit F to the complaint, except to admit that by letter dated January 14, 1976 plaintiff William Safire submitted a letter to the Department of State, and that Exhibit F to the

Amended Complaint is an authentic copy of that letter.

44. Deny as an incomplete statement of the correspondence referred to in paragraph 44 of the Amended Complaint, except to admit that by letter dated February 11, 1976 the Director of the Department of State's Freedom of Information Act staff informed plaintiff Safire the request which plaintiff Safire made in the letter attached to plaintiffs' Exhibit F had been denied.

45. Admit.

46. Deny as an incomplete statement of the correspondence referred to in paragraph 46 of the complaint, except to admit that by letter dated March 29, 1976 plaintiff Safire's appeal was denied.

47. Deny as an incomplete statement of the correspondence referred to in paragraph 47 of the complaint, except to admit that plaintiffs, through their attorneys, forwarded a letter dated January 13, 1976 to the Department of State and that an authentic copy of that letter is attached to the Amended Complaint as Exhibit H.

48. Deny as an incomplete portrayal of the correspondence referred to in paragraph 48 of the complaint, except to admit that by letter dated January 28, 1977, the Department of State responded to plaintiff's request included in the letter attached to the complaint as Exhibit H and that Exhibit I to the complaint is an authentic copy of the Department of State's January 28, 1977 letter.

49. Deny for lack of knowledge or information sufficient to form a belief and as conclusions of law.

50. Deny for lack of knowledge or information sufficient to form a belief and as conclusions of law.

Defendants deny each and every allegation of the complaint not expressly admitted or qualified above.

Defendants deny that plaintiffs are entitled to the relief

prayed for in the complaint or to any relief whatsoever.

WHEREFORE, having fully answered, defendants pray that the action be dismissed with prejudice and that defendants be granted their costs.

Respectfully submitted,

/s/ Barbara Allen Babcock
BARBARA ALLEN BABCOCK
Assistant Attorney General

EARL J. SILBERT
United States Attorney

/s/ Irwin Goldbloom
IRWIN GOLDBLOOM
Deputy Assistant
Attorney General

/s/ Jeffrey Axelrad
JEFFREY AXELRAD

Attorney, Department of Justice
Washington, D.C. 20530
Tel: 202-739-3300

Attorneys for Defendants
Vance and Kissinger

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, et al., Plaintiffs	)	Civil
v.	)	No.
	)	77-0220
CYRUS R. VANCE, et al., Defendants	)	

ANSWER OF DEFENDANT HENRY A. KISSINGER

Defendant Henry A. Kissinger, by his undersigned attorneys, in answer to the Amended Complaint filed herein, says:

FIRST DEFENSE

The Court lacks jurisdiction over the subject matter of this action.

SECOND DEFENSE

Plaintiffs lack standing to maintain this action.

THIRD DEFENSE

The Amended Complaint fails to state a claim upon which relief can be granted.

FOURTH DEFENSE

Answering specifically the allegations contained in the numbered paragraphs of the Amended Complaint, defendant Kissinger admits, denies and otherwise avers as follows:

1. Defendant admits that the action purports to be as

alleged in paragraph 1 of the Amended Complaint, but denies that there has been any violation of the plaintiffs' constitutional or statutory rights.

2. Defendant denies that any of the statutes cited in paragraph 2 of the Amended Complaint confer subject matter jurisdiction over such portion of the action as pertains to defendant Kissinger, and further denies that the amount in controversy, exclusive of interest and cost, exceeds in monetary value the sum of $10,000. Defendant admits that if jurisdiction is found by the Court, venue is proper.

3-14. Defendant admits on information and belief the allegations contained in paragraphs 3 through 14 of the Amended Complaint, except that defendant lacks information or knowledge sufficient to form a belief respecting any of the plaintiffs' future writing plans or the publishing contracts of plaintiffs Burns, Leuchtenburg, and Link, and accordingly denies such allegations. Defendant further denies that any of the plaintiffs require access to the transcribed secretarial notes at issue in this action in order to continue their research and writing activities.

15. Defendant admits on information and belief that plaintiffs desire to study the telephone conversations of defendant reflected in the transcribed notes at issue, as alleged in the second sentence of paragraph 15 of the Amended Complaint, but denies that any such plaintiffs have "direct, immediate and specific legal interests in assuring that the original notes of conversations at issue in this action are preserved, maintained and controlled as property of the United States government and its citizens", as alleged in the first sentence of said paragraph 15. Defendant further denies the allegations of the third sentence of said paragraph 15.

16. Defendant admits the allegations of paragraph 16 of the Amended Complaint, except that defendant denies that

the transcribed notes at issue constitute records of the Department of State and further denies that defendant Vance has any obligations under the Freedom of Information Act to reclaim and make available to the public such records.

17. Defendant admits the allegations of paragraph 17 of the Amended Complaint, except that defendant denies that defendant Boorstin is currently the custodian of portions only of the notes at issue in this litigations, and avers that all such notes are now and since December 28, 1976, have been in the custody of defendant Boorstin.

18. Defendant admits the allegations of paragraph 18 of the Amended Complaint, except that defendant denies that he and his designees now have custody of portions of the notes at issue in this litigation and avers that all such notes are now and since December 28, 1976, have been in the custody of defendant Boorstin.

19. Defendant admits the allegations of paragraph 19 of the Amended Complaint, but avers that the monitoring referred to therein included all telephone conversations of defendant without regard to the subject matter discussed or the identity of the persons spoken with.

20. Defendant admits that substantially verbatim transcripts reflecting the contents of some of the conversations described in paragraph 20 of the Amended Complaint were made, but avers that many of the subject transcripts are inaccurate and incomplete.

21. Defendant admits the allegations of paragraph 21 of the Amended Complaint, but avers that the notes referred to were prepared by his secretaries whose official duties included preparation of private correspondence and other personal memoranda as well as the preparation of official correspondence and further avers that the secretarial notes at issue in this litigation were personal work aids and not official documents.

22. Defendant denies the allegations of paragraph 22 of the Amended Complaint, and avers that such secretarial notes were retained by him as personal work aids and stored in his personal files maintained at the government offices where he worked.

23. Defendant admits the allegations of paragraph 23 of the Amended Complaint, but avers that such secretarial notes also reflect private telephone conversations which do not reflect decisions, policies, deliberations, analyses, actions, or contemplated actions of an official character. Defendant further avers that extracts were made of all significant policy decisions and actions contained in such secretarial notes, and placed in the files of the government agencies having an interest therein.

24-25. Defendant admits that the secretarial notes were made available to members of his immediate staff for administrative purposes, but denies that such notes were reviewed or otherwise used by him in the performance of any Government business.

26-28. Defendant denies the allegations of paragraph 26 through 28 of the Amended Complaint.

29. Defendant lacks information or knowledge sufficient to form a belief concerning plaintiffs' status as "an inherent part of the ongoing political process," as alleged in the first sentence of paragraph 29 of the Amended Complaint, and accordingly denies such allegations. With respect to the second and third sentences of said paragraph 29, defendant admits that the "ongoing political process" depends on "continuing and informed analysis, interpretation, and debate concerning issues of public interest and importance," but denies that plaintiffs will be unable to perform whatever function they may have as participants in such process if they are denied access to the secretarial notes at issue in this litigation.

30-33. Defendant admits the allegations of paragraphs

30 through 33 of the Amended Complaint, but respectfully refers the Court to Exhibit A to the Amended Complaint for a full and complete statement of the terms of said Exhibit A.

34. Defendant admits the allegations of paragraph 34 of the Amended Complaint, but respectfully refers the Court to Exhibit B to the Amended Complaint for a full and complete statement of the matters contained in said Exhibit B.

35. Defendant admits the allegations of paragraph 35 of the Amended Complaint, but respectfully refers the Court to Exhibit C to the Amended Complaint for a full and complete statement of the terms of said Exhibit C.

36-40. The allegations of paragraphs 36 through 40 of the Amended Complaint state conclusions of law to which defendant is not required to respond. To the extent a response may be deemed necessary or appropriate, such allegations are denied.

41-42. Defendant admits the allegations of paragraphs 41 and 42 of the Amended Complaint, but respectfully refers the Court to Exhibits D and E to the Amended Complaint for a full and complete statement of the matters contained therein.

43. Defendant admits the allegations of paragraph 43 of the Amended Complaint on information and belief, but respectfully refers the Court to Exhibit F for a full and complete statement of the matters contained therein.

44-46. Defendant lacks knowledge or information sufficient to form a belief concerning the allegations of paragraphs 44 through 46 of the Amended Complaint, and accordingly such allegations are denied.

47-48. Defendant admits the allegations of paragraphs 47 and 48 of the Amended Complaint on information and belief, but respectfully refers the Court to Exhibits H and I to the Amended Complaint for a full and complete

statement of the matters contained therein.

49. Defendant denies the allegations of the first, fourth, and fifth sentences of paragraph 49 of the Amended Complaint. Defendant lacks knowledge or information sufficient to form a belief respecting the allegations of the second and third sentences of said paragraph 49, and accordingly denies such allegations.

50. Defendant denies the allegations of paragraph 50 of the Amended Complaint.

Defendant denies each and every allegation of the Amended Complaint not expressly admitted or qualified herein.

WHEREFORE, defendant Henry A. Kissinger, having fully answered the allegations in the numbered paragraphs of the Amended Complaint, prays that the Amended Complaint be dismissed with prejudice and that he be granted his costs.

Respectfully submitted,

/s/ David Ginsburg
David Ginsburg

/s/ James E. Wesner
James E. Wesner

/s/ Martha Jane Shay
Martha Jane Shay

GINSBURG, FELDMAN AND BRESS
1700 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 637-9000

Attorneys for Defendant
Henry A. Kissinger

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, et al., Plaintiffs	)	
v.	)	Civil No. 77-0220
CYRUS R. VANCE, et al., Defendants	)	

PLAINTIFFS' STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE TO BE TRIED

Pursuant to Rule 1-9(h) of the Rules of the United States District Court for the District of Columbia, plaintiffs submit the following Statement of Material Facts As To Which There Is No Genuine Issue To Be Tried. The portions of the record which support each paragraph in this Statement are contained in the appendices and affidavits that accompany plaintiffs' Memorandum of Points and Authorities. References to the appropriate appendix or affidavit appear at the close of each paragraph in the Statement.

1. During his service as Assistant to the President and Secretary of State, defendant Kissinger caused substantially all of his telephone conversations concerning official matters to be monitored or recorded. (App. I-2, I-4, I-7, I-8; Affidavit of William Safire, ¶ 4).

[1] "App" denotes appendices to Plaintiffs' Memorandum of Points and Authorities.

2. At defendant Kissinger's direction, verbatim transcripts of these conversations, or secretarial notes that reflected their contents substantially verbatim, were prepared after the conversations took place. (Affidavit of William Safire, ¶ 4; App. I-2, I-4, I-8.)

3. The monitoring of defendant Kissinger's telephone conversations, and the preparation of transcripts or notes based thereon, were performed by employees of the Federal government discharging their official duties. (App. I-2, I-4, I-8, II-4.)

4. The monitoring of defendant Kissinger's telephone conversations, and the preparation of transcripts and notes based thereon, occurred on government time and with the aid of government equipment, materials, office space and other public resources. (App. I-2, I-4, I-8, II-4.)

5. After they were prepared, the notes of defendant Kissinger's official conversations were stored in either White House or Department of State files. (App. I-IV.)

6. While defendant Kissinger was Secretary of State, Department of State policy allowed Department employees to monitor the telephone conversations of senior officials, and to prepare notes summarizing those conversations, only when "deemed absolutely necessary to the conduct of business." (App. III-2.)

7. The purpose for which the secretarial notes of defendant Kissinger's conversations were prepared was to assist him in performing his official duties by functioning as a memory aid and facilitating the implementation and follow-up of the business transacted during the conversations. (App. I-4, II-2, XIII-1.)

8. On occasion, the secretarial notes of defendant Kissinger's official conversations were reviewed by his immediate aides in the course of transacting government business. (App. II-2.)

9. On occasion, the secretarial notes of defendant Kissinger's official conversations were reviewed by other government officials. (Affidavit of William Safire, ¶ 5.)

10. On November 12, 1976, defendant Kissinger entered into a Deed of Gift and Agreement (the "First Agreement") with defendant Daniel Boorstin, the Librarian of Congress. (App. IV-1.)

11. Under the First Agreement, defendant Kissinger, acting as a private citizen, purported to donate to the Library of Congress a collection of personal and governmental papers. (App. IV-1.)

12. Under paragraph 4 of the First Agreement, public access to these materials will not begin until after 25 years or 5 years from the death of defendant Kissinger, whichever occurs later. (App. IV-3, IV-4.)

13. Until public access to the materials begins, paragraph 7 of the First Agreement limits their availability to (1) employees of the Library of Congress that have been jointly approved by the Librarian of Congress that have been jointly approved by the Librarian of Congress and defendant Kissinger; (2) persons who have received the written permission of defendant Kissinger; and (3) after defendant Kissinger's death, persons who have received the written permission of a committee to be named in his will. (App. IV-5.)

14. Under paragraph 6 of the First Agreement, defendant Kissinger is entitled to unrestricted access during his lifetime to the materials covered by the Agreement. (App. IV-4.)

15. Under paragraph 6, the Library of Congress is obligated to provide defendant Kissinger with working space where he can use the materials and to permit examination of the materials by all research assistants employed by him who have appropriate security clearances. (App. IV-4).

16. On December 24, 1976, defendants Kissinger and Boorstin entered into a Second Deed of Gift and Agreement (the "Second Agreement") under which defendant Kissinger "donated" to the Library of Congress the transcribed secretarial notes of his telephone conversations while a government employee. (App. V-1.)

17. The Second Agreement incorporates by reference all the terms and conditions of the First Agreement and further provides that public access to the notes of defendant Kissinger's telephone conversations will be permitted only with the consent, or upon the death, of the other parties to the telephone conversations in question. (App. V-1.)

18. In a letter to defendant Kissinger dated January 4, 1977, the Archivist of the United States requested that archivists working under his supervision be permitted to inspect the secretarial notes of defendant Kissinger's conversations. (App. VI-1, VI-2.)

19. In a letter to the Archivist dated January 18, 1977, defendant Kissinger rejected the Archivist's request. (App. VII-1.)

20. On January 14, 1976, plaintiff William Safire asked the Department of State to provide, pursuant to the Freedom of Information Act, (1) all notes of defendant Kissinger's telephone conversations in which his own name appeared, and (2) all notes of conversations between Mr. Kissinger and certain designated individuals in the course of which information leaks from government agencies during the Nixon Administration were discussed. (App. XV-2.)

21. In a letter dated February 11, 1976, the Department of State denied plaintiff Safire's request — *inter alia*, on the ground that the secretarial notes of defendant Kissinger's telephone conversations do not constitute "agency records" subject to the Freedom of Information Act. (App. XVI-2.)

22. Plaintiff Safire filed an appeal from the Depart-

ment's denial of his request on February 24, 1976. (App. XVII.)

23. On March 29, 1976, the Chairman of the Department's Council on Classification Policy wrote to Mr. Safire to affirm that denial — among other grounds, on the basis that the notes of defendant Kissinger's telephone conversations are not "agency records" within the meaning of the Freedom of Information Act. (App. XVIII-2.)

24. On January 13, 1977, the remaining plaintiffs, through their attorneys, submitted to the Department of State a Freedom of Information Act request for all the transcribed secretarial notes of defendant Kissinger's official telephone conversations. (App. VIII-1.)

25. The Department denied plaintiffs' request in a letter dated January 28, 1977. The letter asserts that the notes of defendant Kissinger's conversations are not "agency records" subject to the Freedom of Information Act and advises plaintiffs that, in any event, the notes are no longer in the Department's custody. The letter also informs plaintiffs that recourse to the Department's Freedom of Information Act appeal procedures is unnecessary. (App. VIII-1, VIII-2.)

Respectfully submitted,

Charles A. Horsky

/s/ Peter Barton Hutt
Peter Barton Hutt

/s/ Robert Matthew Sussman
Robert Matthew Sussman

COVINGTON & BURLING
888 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 452-6000

April 18, 1977 *Attorneys for Plaintiffs*

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MORTON H. HALPERIN, et al., Plaintiffs,	)	
v.	)	Civil Action No. 1187-73
HENRY A. KISSINGER, et al., Defendants.	)	

FEDERAL DEFENDANT KISSINGER'S RESPONSES TO PLAINTIFFS' FIRST SET OF INTERROGATORIES

Comes now Federal defendant Henry A. Kissinger, by and through his undersigned attorneys, and responds to the Plaintiffs' Interrogatories as follows:

(1) Please describe, give the date of, and identify who was present at any and all meetings which you attended during 1969, prior to May 9, at which any of the following subjects were discussed: (a) leaks, (b) wiretapping of government officials and newsmen, (c) the hiring or retention on your staff of Morton Halperin.

Response: 1(a). With respect to meetings prior to May 9, 1969, at which leaks were discussed:

In this period, basic changes in policies were being considered which would establish fundamental approaches to major foreign policy and national security issues, including, for example, reexamination of the United States strategic posture, negotiating positions in the strategic arms limitations talks (SALT), a new initiative toward the People's Republic of China, negotiations to end the war in Vietnam, defense and political issues before the Atlantic Alliance, the Arab-Israeli dispute and East-West trade.

Because of the complexity and sensitivity of these matters, we earnestly believed that secrecy with respect to their consideration and of decisions taken was of vital importance and that success or failure of particular initiatives could depend upon the maintenance of the necessary confidentiality. Consequently, there was great concern about leaks in this period. I had conversations on the subject of leaks with the individuals referred to in my response to Question 1(a) as well as others.

Business telephone calls from my White House office were usually monitored by my personal secretaries, who then prepared brief summaries of those conversations. The summaries are not complete, and may not, in some cases accurately reflect the substance of the conversations covered. An examination of these summaries of conversations prior to May 9, 1969, does not disclose any conversation concerning Morton Halperin or the wiretap program. They do, however, reflect some conversations in which leaks were discussed, the gist of which is set forth below.

Federal defendant Kissinger objects to providing the names of third persons not parties to this litigation on the grounds that the names of those persons are not relevant to the litigation, and further that providing such names would constitute a violation of the right of privacy of such persons.

On February 3, 1969, I spoke with [A]. The summary of that conversation states, in part: "K and [A] discussed press leaks."

On February 19, 1969, I had a conversation with [B]. The summary of that conversation states, in part: "K said this was probably unnecessary call but President is very anxious that there be no leaks of any sort about trend of the discussion today. [B] said he would say nothing."

On March 18, 1969, I had a conversation with [C]. The summary states, in part: "HAK said the President's first

concern was if the things we are trying to do leaked, it would lose its effectiveness."

On March 28, 1969, I had a conversation with [D] regarding stories in the *Times* and *Post* on March 27 and March 28. [D] reported on his unsuccessful efforts to find the source of the leaks.

Federal defendant Kissinger objects to responding to this interrogatory as it relates to Henry Brandon. Because Brandon is not a party to the litigation, inquiry as to him is not relevant. Further, any response by the Federal defendant may constitute an infringement of Brandon's right of privacy.

71 A. What records did you make in the period Jan. 21, 1969 to Feb. 12, 1971 of (i) meetings you attended (ii) persons who visited your office (iii) telephone conversations in which you participated (iv) correspondence you wrote or received?

Response: With respect to records of meetings I attended or persons who visited my office:

From January 21, 1969, through October 21, 1969, an appointments book was kept, listing daily appointments as they were scheduled. This usually listed only formal meetings, outside appointments, or appointments with outside visitors. From October 22, 1969, through February 12, 1971, a daily record of schedule was kept, which recorded the events of the day as they occurred. This record, unlike the appointments book, included some of my informal activity in the White House and reflects all those, including my staff, who entered my office. These records were kept by my secretaries, who were usually not in a position to record subject matter of discussions, whom I met with in all meetings outside my own office, or my daily activities when outside of Washington.

With respect to records of telephone conversations in which I participated and correspondence I wrote or

received during the period January 21, 1969 through February 12, 1971:

Business telephone conversations from my White House office during this period were usually monitored by my personal secretaries and records prepared, in accordance with routine government practice, in order to facilitate implementation and follow-up of business transacted.

Correspondence was deposited with White House Central Files or Substantive Files.

71 B. Where and in whose custody are such records now? If you do not know where they are now, where and in whose custody were they last, to your knowledge?

Response: All such records, with the exception of the records of my telephone calls, are in the White House. They are in the custody of the NSC staff. The telephone records are in the State Department, in the custody of Mr. Lawrence S. Eagleburger.

/s/ Henry A. Kissinger
HENRY A. KISSINGER

[Jurat omitted in printing]

Respectfully submitted,

RICHARD L. THORNBURGH
Assistant Attorney General

/s/ Robert L. Keuch
ROBERT L. KEUCH
Attorney, Department of Justice

/s/ Edward S. Christenbury
EDWARD S. CHRISTENBURY
Attorney, Department of Justice

/s/ Elizabeth Gere Whitaker
ELIZABETH GERE WHITAKER
Attorney, Department of Justice
Washington, D.C. 20530
202 739-5282

Counsel for Federal
defendant Kissinger

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MORTON H. HALPERIN, et al., Plaintiffs,	)	
	)	Civil
vs.	)	Action
	)	No. 1187-73
HENRY A. KISSINGER, et al., Defendants.	)	

Deposition of HENRY A. KISSINGER

[pp. 92-95; 99]

What are those documents?

A The same documents you have been showing me.

Q All of those documents have been made available to us that you consulted in connection with preparation, other than those which relate to other people?

A I will have to ask my lawyers.

MR. KEUCH: Yes, I will state for the record that we have been working with the Secretary's staff trying to exhaust every document that he was using, and have tried to comply as fully as we can within the range of human perfection.

BY MR. SLOCOMBE:

Q Does the appointment book which you refer to — I think it is the very last answer — 71A on page 46, next-to-the-last answer — that appointment book presumably covers April 25, 1969.

A Well, I have explained to you that between — from January until October, my records were very sporadic, and cover no internal appointments at all. They only covered people who came in — or substantially people who came in from the outside to see me.

From October 1970 on, we kept a detailed log that would account for practically all of my day. And, therefore, for

that precise period, my own records are very inconclusive.

Q I would still request that the April 25th, 1969, appointment book be made available to us under the same rules as the others have, that is, with everybody blocked out except the parties and Mr. Hoover.

MR. KEUCH: If we can find any such document for that date, we will supply it.

MR. SLOCOMBE: Our next exhibit is Plaintiff's W.

(The document referred to was marked for identification as Plaintiff's Exhibit W)

BY MR. SLOCOMBE:

Q I take it that in the period that we are talking about, that is, January 1969 through February of 1971, you did not — did you cause any recordings or monitoring to be made of your telephone conversations that produced a written record?

A I don't remember — the reason taping was instituted of telephone conversations— I don't remember when it was, that it was instituted. It was a technical device, because too much of the time of the secretaries during the day was consumed in listening to the conversations. The tapes were then transcribed in the evening and destroyed that same evening. No tapes were ever kept.

Q You say in your answers that they were monitored by personal secretaries and records prepared.

A I would suppose during that period that was the case.

Q Someone just sat and listened.

A Someone sat and listened and took shorthand.

Q Have you searched yourself or caused a search to be made through those monitored records for references to the wiretap program, and specifically the wiretap on Morton Halperin?

A Yes, and I haven't found anything.

Q Who conducted that search?

A Mr. Eagleburger. I have never looked at these records.

Q Mr. Eagleburger actually read through the transcripts of the telephone conversations?

A To the best of my knowledge, for the questions that you asked in the interrogatories.

Q Did he also read through the transcripts to see if there was any information in those transcripts relating to matters relevant to this case?

A I am not sure, we would have to ask him.

Q I want to request that that be done, because I think that that is a matter which is within the scope of our Rule 34 request of records relating, a search of records relating to —

MR. KEUCH: We will consider that request, Mr. Slocombe, and respond to you as soon as we can.

BY MR. SLOCOMBE:

Q Our final exhibit is Plaintiff's W, which is an article from the New Republic by John Osborne, and I call your attention to the paragraph on —

A What's the date?

Q January — February 14, 1976. I call your attention to page 9, the righthand column, about halfway down the continuation paragraph, where it says "It was in private communication with journalists that Kissinger got himself into trouble and generated a doubt, usually reflected rather than explicitly stated in print and in broadcast, about his believability. In two examples drawn from my experience . . ." —

A Wait a minute, where are you now?

Q Page 9, the righthand paragraph, about the middle of the first paragraph, at the top of the page

MR. KEUCH: We have it.

* * *

I have read the foregoing 98 pages, which contain a correct transcript of the answers made by me to the questions therein recorded.

/s/ Henry A. Kissinger
HENRY A. KISSINGER

[Jurat omitted in printing]

APPENDIX IX

THE WASHINGTON POST
Feb. 11, 1977

KISSINGER SIGNS BOOK CONTRACT FOR MEMOIRS

By Christopher Dickey
Washington Post Staff Writer

Former Secretary of State Henry A. Kissinger has signed a contract with Little, Brown and Co., a subsidiary of Time Inc., for the publication of his memoirs in the United States and Canada.

Though the amount paid to Kissinger was not revealed by any parties directly involved with the contract, several industry sources place the figure at about $2 million.

There had been speculation that Kissinger would receive a much higher sum — as much as $5 million — in a single deal including all subsidiary rights. But Little, Brown has bought only the U.S. and Canadian hardback, paperback and book club rights to the memoirs, the company's president, Arthur II Thornhill Jr., said "We have not purchased the foreign rights. Serialization and syndication rights will probably not be sold for a few weeks," he said.

At least two houses, Simon and Schuster and Holt, Rinehart and Winston were known to be using the figure of $1 million as a guideline to the value of foreign, serialization, and syndication rights in determining their bids for the memoirs. Television and movie rights have also been retained by Kissinger. Their value is unclear.

(See KISSINGER, A6, Col. 3)

KISSINGER GETS MEMOIRS PACT, AMOUNT IS SEEN AT $2 MILLION

KISSINGER, From A1

Stewart Richardson, editor-in-chief of Doubleday, said that his company had only been interested in acquiring the entire rights package.

The sale of the remaining subsidiary rights will be handled by Kissinger's agent, Marvin Josephson. Thornhill expects to have a voice in "coordinating" the negotiations.

In the official announcement, Thornhill said, "I expect the book to be completed in the fall of 1979. The author intends to treat his role in government from 1963 to 1976 in depth." That period included the withdrawal from Vietnam, the peace negotiations in the Middle East, and Watergate.

Thornhill suggested that these "momentous events in United States history will make Dr. Kissinger's book fascinating and extremely valuable."

APPENDIX XI

GENERAL SERVICES ADMINISTRATION
WASHINGTON, D.C. 20405

November 15, 1976

GSA BULLETIN FPMR B-65
ARCHIVES AND RECORDS

TO: Heads of Federal Agencies
SUBJECT: Disposition of personal papers and official records

1. *Purpose.* This bulletin summarizes the requirements of Federal law and related regulations and reminds all Federal agencies of their legal responsibility to (a) inform agency officials and personnel about established procedures for maintaining personal papers and (b) ensure the security and integrity of Federal records.

2. *Expiration date.* This bulletin contains information of a continuing nature and will remain in effect until canceled.

3. *Background.*

a. 44 U.S.C. 3301 legally defines the word "records" to include —

> . . . all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational

> value of data in them. Library and museum material made or acquired and preserved solely for reference or exhibition purposes, extra copies of documents preserved only for convenience of reference and stocks of publications and of processed documents are not included.

b. FPMR 101-11.202-2(d) provides a legal definition of personal papers and prescribes standards for their maintenance —

> Papers of a private or nonofficial character which pertain only to an individual's personal affairs that are kept in the office of a Federal official will be clearly designated by him as nonofficial and will at all times be filed separately from the official records of his office. In cases where matters requiring the transaction of official business are received in private personal correspondence, the portion of such correspondence that pertains to official business will be extracted and made a part of the official files . . . .

c. The definition of official records involves materials made or received either in pursuance of Federal law or in connection with the transaction of public business. The definition of personal papers covers material pertaining solely to an individual's private affairs. In other words, correspondence designated "personal," "confidential," or "private," etc., but relevant to the conduct of public business, is nonetheless an official record subject to the provisions of Federal law pertinent to the maintenance and disposal of such records. Official records are public records and belong to the office rather than to the officer.

d. The legal definition of records (44 U.S.C. 3301) specifically excludes "extra copies of documents preserved

only for convenience of reference." Such extra copies of documents are commonly regarded as nonrecord materials and are disposable without reference to the requirements of chapter 33, Title 44, United States Code. A Government official may accumulate for convenience of reference extra copies of papers and other materials which he has drafted, reviewed, or otherwise acted upon. When deposited in a research institution, extra copies can serve the needs of historical scholarship. Government officials may be permitted to retain these extra copies, provided that such retention would not (1) diminish the official records of the agency; (2) violate confidentiality required by national security, privacy, or other interests protected by law; or (3) exceed normal administrative economies.

e. Federal law (44 U.S.C. 3105) requires heads of Federal agencies to establish safeguards against the removal or loss of Federal records. Such safeguards include notifying agency officials that (1) the alienation and destruction of records in agency custody is governed by specific provisions of chapter 33, Title 44, United States Code, and (2) criminal penalties are provided for the unlawful removal or destruction of Federal records (18 U.S.C. 2071) and for the unlawful disclosure of certain information pertaining to national security (18 U.S.C. 793, 794, and 798).

f. Federal law (44 U.S.C. 3106) requires heads of Federal agencies to notify the Administrator of General Services of any actual or threatened unlawful removal or destruction of records in their custody. The Archivist of the United States has been delegated authority to assist agency heads in initiating action through the Attorney General for the recovery of records unlawfully removed.

4. *Requested action to be taken by agencies.*

a. Agency heads should review their records management programs and determine whether adequate

safeguards exist against the inadvertent or unlawful loss of Federal records. Adequate safeguards include the following measures:

(1) Ensure that employees are acquainted with the Federal law governing the disposition of official records. Disposal of Federal records can occur only as a result of authorization of NARS approved records control schedules or provisions of general records schedules covering records common to one or more Federal agencies.

(2) Ensure that employees are aware of the criminal penalties that attach to the unlawful removal or destruction of Federal records. Employees also should be made aware of their legal responsibility for informing their records management officer of any actual or threatened unlawful loss or removal of official records.

(3) Ensure that employees are aware of the requirement for identifying and maintaining their personal papers separately from official records. Records management officers should monitor compliance with this requirement on a regular basis.

b. An effective means of bringing these legal requirements to the attention of agency personnel is incorporation of the requirements into agency files maintenance manuals and records control schedules. Adequate and proper separation and control of personal papers at the time of their creation offers the best approach for avoiding the problem of commingled personal and official papers. Widespread knowledge of the requirement for identifying and separating official from private papers at the time of their creation can assist greatly in establishing adequate and proper control over private papers.

5. *Assistance to agencies.* The National Archives and Records Service will assist agencies in appraising a body of materials and determining whether it comprises personal

papers or official records. O al requests for such assistance should be directed to the Records Disposition Division, Office of Federal Records Centers, telephone number 376-8845. Written requests should be forwarded to the General Services Administration (NC), Washington, DC 20408.

/s/ James B. Rhoads
JAMES B. RHOADS
Archivist of the United States

APPENDIX XII

THE WHITE HOUSE
WASHINGTON

November 30, 1976

MEMORANDUM FOR THE WHITE HOUSE STAFF

FROM: PHILIP W. BUCHEN /s/ P.W.B.

SUBJECT: PRESIDENTIAL PAPERS

The President intends to arrange for the deposit of papers related to his administration as President in a library similar to the libraries for papers of other Presidents. There they will be preserved and made accessible for research and reference purposes, along with his papers that are related to the other public offices he has held and to his political activities. For historical purposes, it is most important that the library collection be complete and comprehensive and that there be no omission or loss of documents which may have historical value.

This memorandum sets forth guidelines for handling the papers and other materials in the custody of various members of the President's staff that apply to the papers of the White House Office, the Domestic Council, the Economic Policy Board, the Energy Resources Council, and the Council on International Economic Policy and to the Presidential files of the National Security Council. The papers of staff members within other offices of the Executive Office of the President, e.g., OMB, CEA, CEQ, STR, OTP, etc., are subject to the requirements of the Federal Records Act and will be handled accordingly. Any questions concerning these guidelines should be raised at the earliest possible time with Barry Roth, Extension 2397.

1. Prior to departure from the President's staff, each staff member should turn over all the papers and other materials in his or her possession to Central Files with the exception of his or her purely personal papers or

materials. Official papers classified Secret and higher, including compartmented intelligence documents, should be turned in to the Staff Secretary. Campaign related materials as well as official materials are to be preserved and deposited in Central Files. To the extent practicable, official and campaign materials should be separated before being sent to Central Files. Papers and materials for Central Files should be placed in storage boxes available for that purpose from Frank Matthews, Ext. 2240, and should be accompanied by an index listing the file folder titles or giving other descriptions of the contents in each box.

Material classified Secret and above being turned in to the Staff Secretary should be placed in boxes or large manila envelopes, securely taped, and accompanied by an unclassified listing of contents on the outside. The box or envelope itself should be clearly marked with the highest level of documents it contains and include the name of the individual or office submitting the material.

2. Purely personal files and materials, including original documents, may be taken by the departing staff member. Such files include correspondence unrelated to any official or campaign duties performed by the staff member; daily appointment records and telephone logs; personal copies of books, pamphlets and periodicials; folders of newspaper or magazine clips; copies of records of a personal nature relating to a person's employment or service; and personal copies of photographs, proclamations, commissions or similar commemorative items. Personal files *do not* include any copies, drafts or working papers that relate to official business or the campaign.

3. A staff member may make a copy or may retain an extra copy of a document which embodies original intellectual thought contributed by the staff member or

any of his assistants, such as the product of research, the notes or drafts of speeches delivered by the staff member, and drafts of proposed legislation; and the copy of any other document written or signed by the staff member that is included in his or her chronological files, along with a duplicate of each related incoming letter or memorndum, may be retained if the original incoming document remains in the Presidential papers; *provided, however,* no copies may be retained of any documents which come within any of the following categories:

(a) Material classified for reasons of the national security under Executive Order 11652;

(b) Restricted data under the Atomic Energy Act of 1954, as amended;

(c) Information supplied to the government under statutes which make the disclosure of such information a crime; or

(d) Memoranda of all types written to the President; other documents that contain recommendations or advice made directly or indirectly to the President; proposed drafts of speeches or statements for the use of the President; schedule proposals to the President; briefing papers used in discussions with the President and records made of such discussions; minutes of meetings of the EPB, ERC, and similar cabinet-level organizations; personnel recommendations or evaluations, and the like.

A staff member who has had access to materials among the Presidential Papers who subsequently needs to inspect them, for his personal use, will be permitted to do so after their accession in the Presidential library, subject to such restrictions as may be generally applicable at the time of the requested inspection.

The cooperation and assistance of each staff member in the collection of such materials is requested. This includes materials not only in your office but those materials pertaining to your official duties which you may have other than at your present office.

In order to assist in the collection of these materials for the President, staff members should begin depositing them in Central Files or with the Staff Secretary, as appropriate, as soon as possible. It is expected that staff offices will deposit all inactive files no later than mid-December and the bulk of any remaining files by January 10. Any offices desiring the assistance of archivists for this purpose should contact Barry Roth who will make the appropriate arrangements.

STATEMENT BY S/PRS, DECEMBER 28, 1976

Secretary Kissinger announced today that he is donating to the United States of America, for preservation at the Library of Congress, the transcribed secretarial notes of telephone conversations during his years in government.

The notes were made as a memory aid and to insure appropriate administrative follow-up, but were not in themselves action documents. They were never circulated, and any action resulting from the conversations would be contained in the administrative follow-up.

Nevertheless, to avoid any misinterpretation during his final days in public office, the Secretary has decided to give the notes at this time to the Library of Congress, as part of the gift to the nation of his personal and public papers which was announced last week. The notes are being donated under a separate deed of gift, because of the significant rights of privacy that may exist for persons who were parties to the telephone conversations. This separate deed of gift incorporates the terms of the original donation. At the end of the time period specified in the original donation, any paper in this group will be available for public access. The sole difference is that if one of the parties to the conversation is still living, his consent must first be secured. A copy of the deed of gift is attached.

DEPARTMENT OF STATE
Washington, D.C. 20520

February 11, 1976

Mr. William Safire
The New York Times
Washington Bureau
1920 L Street, N.W.
Washington, D.C. 20036

Case No. 610050

Dear Mr. Safire:

This is to respond to your request of January 14, 1976, under the Freedom of Information Act, for "information from transcripts of telephone conversations now in the custody of Mr. Lawrence S. Eagleburger of the State Department."

Your letter specifically refers to telephone conversations that Dr. Kissinger participated in between January 21, 1969, and February 12, 1971, and requests two categories of materials:

1. "all transcripts (including rough drafts, if such exist) in which my name appears."

2. "all transcripts (including rough drafts, if such exist) of conversations between Mr. Kissinger and General Haig, or Mr. Kissinger and Attorney General John Mitchell, or Mr. Kissinger and J. Edgar Hoover, or Mr. Kissinger and any other official of the FBI, or Mr. Kissinger and President Richard M. Nixon in which the subject of 'leaks' of information was discussed."

We have consulted with the Office of the Legal Adviser concerning your letter. That office has been authorized to review the documents that appear to be covered by your request, for the purpose of determining whether such

documents are subject to the Freedom of Information Act. It has advised us of the following:

1. Although your request describes the documents as "transcripts," this description is not entirely accurate. As described in Secretary Kissinger's Responses to Interrogatories in the Halperin litigation, to which your request refers, the documents range from brief and incomplete summaries to detailed or paraphrased accounts of telephone conversations. The documents are in rough draft form and never have been reviewed for accuracy. Your request has been treated as referring to this group of documents.

2. The documents are not subject to the Freedom of Information Act. Both because of the nature of the documents and because of Dr. Kissinger's position at the time the documents were made, they are not records of the Department of State or of any other "agency" and, thus, are not "agency records" within the meaning of the Freedom of Information Act.

3. Even if the documents in question were considered to be "agency records" within the meaning of the Act, they would appear to fall clearly within Exemption 5 of that Act. In addition, other specific statutory exemptions, notably Exemption 1, would be applicable, as would claims of invasion of privacy.

4. Beside falling outside the purview of the Freedom of Information Act, the documents are not contained in any file which is retrievable or indexed by any name or identifying symbol or code; therefore, they are not subject to disclosure under the Privacy Act, 5 U.S.C. 552a.

5. Since this letter is not a denial of a "record" under section 6.6(b) of the Department of State's Freedom of Information regulations (copy attached), the appeal provisions of those regulations (section 6.8) are not technically applicable. However, if you wish to bring additional considerations to the Department's attention or to have a further review made of your request, you may address a letter to the Assistant Secretary of State for Public Affairs, Chairman, Council on Classification Policy, Department of State, Washington, D.C., 20520. Matters presented in such a letter would be given prompt and complete consideration.

Sincerely,

/s/ Barbara Ennis
Barbara Ennis
Director
Freedom of Information Staff
Bureau of Public Affairs

Attachment:
Department of State Freedom
of Information Regulations

DEPARTMENT OF STATE
Washington, D.C. 20520

March 29, 1976

Dear Mr. Safire:

This response is with respect to your letter of February 24, 1976, in which you "appeal the denial of [your] request for information from transcripts of telephone conversations now in the custody of Mr. Lawrence S. Eagleburger of the State Department."

Your original Freedom of Information Act request of January 14, 1976, seeks two categories of materials from telephone conversations that Dr. Kissinger participated in between January 21, 1969, and February 12, 1971:

1. "All transcripts (including rough drafts, if such exist) in which my name appears."

2. "All transcripts (including rough drafts, if such exist) of conversations between Mr. Kissinger and General Haig, or Mr. Kissinger and Attorney General John Mitchell, or Mr. Kissinger and J. Edgar Hoover, or Mr. Kissinger and any other official of the FBI, or Mr. Kissinger and President Richard M. Nixon in which the subject of 'leaks' of information was discussed.

In the Department's letters of February 11 and March 2, it was indicated to you that since the documents encompassed by your request were not "agency records" within the meaning of the Freedom of Information Act, you were not technically entitled to an appeal under the Department of State's regulations. 22 C.F.R. 6.8. Although we are still of the view that you are not entitled to an appeal, we have employed the same procedures to your request as would be applicable to an appeal.

Your letter of February 24 raises the following points concerning the legal status of the documents encompassed by your request:

1. Your letter asserts that the documents encompassed by your request must be agency records of the Department of State, because they are physically located at the Department of State in the custody of the Executive Assistant to the Secretary who is also a Department of State employee. The Department's Office of the Legal Adviser, however, advises us that the law is clear that the current location of a document does not control the document's status under the Freedom of Information Act, and that documents which are originated in a White House office by a member of the President's immediate staff, such as the President's Special Assistant for National Security Affairs, are not subject to the Act. Senate Report No. 93-1200, at 15 (1974). It should also be noted that the memoranda of telephone conversations have not been preserved as evidence of Department of State business. As indicated in the Department's earlier letter, the Department's Office of the Legal Adviser determined that the documents you seek are not "agency records" within the meaning of the Freedom of Information Act. The Office of the Legal Adviser has again reviewed this issue and has reaffirmed its original view.

2. Having reviewed the documents covered by your request, the Department's Council on Classification Policy has determined that, in the event the documents you seek should be deemed to be agency records, exemption 5 under the Freedom of Information Act would be clearly applicable. It is the Council's view that these documents would be regarded as inter-agency or intra-agency memoranda describing candid working discussions of government officials and others, leading to the formulation of government decisions and policies.

3. Your letter asserts that "an additional claim of invasion of privacy, especially in those matters concerning

this appellant [i.e., yourself], is in error." The Department's Office of the Legal Adviser advises, however, that yours are not the only privacy interests which may be at stake. For example, if a memorandum of conversation mentioned the names of several persons, including yours, privacy interests might be at stake for all of the persons mentioned, as well as for the actual parties to the conversation. If your Freedom of Information Act request turned on the privacy interests of others besides yourself, these interests could not be ignored.

4. Your letter suggests a government official circumvents the Privacy Act "simply by refraining from indexing material that ought to be available to citizens." The Department's Office of the Legal Adviser has indicated to us that the Privacy Act does not require indexing; that it would be incongruous for legislation designed to protect privacy to require government officials to index all documents in their custody, and thereby arm themselves with greater access to information about individual citizens; and that since the documents covered by your request are not contained in any file which is retrievable or indexed by any name or identifying symbol or code, they are not subject to disclosure under the Privacy Act.

In summary, having reviewed your letter of February 24, the Department has concluded that the documents you seek are not subject to disclosure under the Freedom of Information Act because they are not agency records. Even if they were deemed to be agency records, the Council on Classification Policy has determined that exemption 5 under the Freedom of Information Act would clearly exempt these documents from disclosure.

Sincerely,

/s/ John E. Reinhardt
John Reinhardt
Chairman
Council on Classification Policy

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, et al., Plaintiffs,	)	
v.	)	No. 77-0220
CYRUS R. VANCE, et al., Defendants.	)	

AFFIDAVIT OF WILLIAM SAFIRE

CITY OF WASHINGTON)
DISTRICT OF COLUMBIA) ss.

I, William Safire, being duly sworn, depose and say:

1. I am a plaintiff in the above-captioned action and, by profession, a journalist and author with considerable experience in reporting on the actions of the government and its officials.

2. Prior to 1969, I spent several years working as an author, public relations consultant and reporter. From January 20, 1969 until April 1, 1973, I was a Special Assistant to President Richard M. Nixon. Since leaving that position, I have been employed by the *New York Times*, for which I write a regular column.

3. During my service as Special Assistant to former President Nixon, my primary function was to write

speeches. In that capacity, I had frequent occasion to converse — by phone or in person — with Henry A. Kissinger, who is a defendant in this lawsuit and was Assistant to the President for National Security Affairs during much of the period that I worked at the White House.

4. In the course of my discussions with defendant Kissinger, I learned that it was his regular practice to have government employees monitor or record substantially all of the telephone conversations he had as a public official. I also learned that, subsequent to these conversations, defendant Kissinger had government employees prepare verbatim transcripts of the conversations or secretarial notes that reflected their contents substantially verbatim.

5. In 1971, during a meeting I had with defendant Kissinger, I was shown the transcript of a telephone conversation between defendant Kissinger and a reporter for The Christian Science Monitor. As reflected in the transcript, the conversation concerned an article by the reporter which Mr. Kissinger considered critical of his actions. Upon examining the transcript, I noticed handwritten markings which appeared to represent modifications in the version of the conversation that the transcript contained. The effect of these modifications was to change defendant Kissinger's statements during the conversation so that they reflected greater loyalty by him to then-president Nixon. Based on the discussion I had with defendant Kissinger at the time, it was my impression that defendant Kissinger intended to send the transcript to the then-President and wished to portray his statements to the reporter in a more flattering light.

6. I have published accounts of the above incident on two occasions. The incident was described in my *New York Times* column of January 15, 1976 and in my book *Before the Fall*, which was published by Doubleday in 1975 and recounts my experiences during my years as a White House

Assistant. Both accounts of the incident are attached hereto as Exhibits A and B.

7. The contents of this affidavit are true to the best of my information, knowledge and belief.

/s/ William Safire
William Safire

[Jurat omitted in printing]

EXHIBIT A

[P. 169 From "Before The Fall"
by William Safire
(Doubleday 1975).]

HENRY THE K

The reason why it is logical to assume that the wiretap program had Dr. Kissinger's enthusiastic support, and why his subsequent protestation of distaste rings false, is the operation of his "dead key." All telephone calls to Henry Kissinger, except those few from girl friends, were monitored by a relay of stenographers in his outer office. President Nixon knew his calls were being taken down verbatim whenever he spoke to his national security adviser, and it is a good idea for a record of such calls to exist: when both men know they are being recorded, no moral problem arises. But not many other people who called Dr. Kissinger, and discussed matters in confidence, knew their words were being taken down and in some cases circulated. George Shutlz, when Director of the Office of Management and Budget, was startled to learn from an NSC staffer of the details of a private call he had made earlier that day with Henry. After that, Shultz was guarded in whatever he said to Kissinger on the phone.

Henry would use the surreptitious "telecon" transcripts to prove his loyalty to the President. Complaining to a correspondent about the perfidy of his archrival, Secretary of State Rogers, Henry then edited the transcript, changing words to reflect stronger support of the President by Kissinger, and sent the revised version along to Haldeman — an act of dishonor to the unsuspecting reporter and an act of disloyalty to the President. A man who could do this was capable of eavesdropping on his associates without scruple, and was capable of getting a special thrill out of working most closely with those he spied upon most.

This tolerance of eavesdropping was the first step down the Watergate road. It led to eavesdropping by the plumbers, to attempted eavesdropping on the Democratic National Committee, and to the ultimately maniacal eavesdropping by the President, on the President, for the President, completing the circle and ensuring retribution. Eavesdropping to protect Presidential confidentiality led to the greatest hemorrahage of confidentiality in American history, and to the ruination of many good men. Henry Kissinger was deft in beguiling the Senate Foreign Relations Committee, but he cannot escape history's judgment of the way he watered the roots of Watergate.

In 1969 and 1970, however, Henry Kissinger was not troubled with the morality of the taps, because, for all practical purposes, they were precedented (he thought), legal (he assumed), and would never be discovered (of that he was certain). The mind of Henry the K had comprehensive ability almost equal to Richard Nixon's — that is, it could range the entire horizon, from the creation of grand geopolitical concepts to the manipulation of minute bargaining levers, and then go vertically with the same breath-taking sweep, from niggling little bureaucratic intrigues and tricks to a profound concern for "moral authority," stopping along the way at the pessimistic realism of Oswald Spengler (the author of *The Decline of* . . . .

EXHIBIT B

[New York Times, 1/15/76]

THE DEAD-KEY SCROLLS

By William Safire

WASHINGTON, Jan. 14 — A "dead key", in Washington parlance, is a receiving extension built into a telephone to permit a secretary to listen in to her boss's conversations without the caller suspecting that everything said is being overheard by a third party.

As soon as they entered the White House, and a full two years before the secret Nixon taping system was installed, Henry Kissinger and his deputy, Al Haig, made certain that relays of secretaries on "dead keys" made verbatim notes of all that was said to them over the telephone. The callers — reporters, colleagues, Presidents — were never told that their words were always taken down.

But within the White House it was no big secret aides could see the secretaries outside Henry's door, extensions to their ears, taking shorthand silently.

In 1971, my then-colleague and friend, Henry, showed me the transcript of a conversation with a reporter for The Christian Science Monitor, in which the National Security Adviser chewed him out for a less-than-adulatory article. Since he was planning to send the transcript to President Nixon, the rough draft had "corrections" marked by Mr. Kissinger, adding to the fierce loyalty of his own remarks.

Even with the self-serving emendations, these transcripts are an invaluable, irreplaceable part of the record of the Nixon Presidency, pre-dating as well as paralleling the White House tapes. What has happened to them? The other day, we began to find out.

In a sworn answer to a question submitted to him by Morton Halperin, who is suing Mr. Kissinger for his part in ordering illegal F.B.I. wiretapping, the Secretary of State

writes: "Business telephone conversations from my White House office during this period [Jan. 21, 1969 to Feb. 12, 1971] were usually monitored by my personal secretaries and records prepared, in accordance with routine Government practice, in order to facilitate implementation and follow-up of business transacted."

And where are all his records kept? Appointment books, correspondence, schedules of his White House years, says Mr. Kissinger, have remained where they belong: "All such reocrds, with the exception of the records of my telephone calls, are in the White House. They are in the custody of the N.S.C. [National Security Council] staff. The telephone records are in the State Department, in custody of Mr. Lawrence S. Eagleburger."

Hold on a minute: When Mr. Kissinger left the White House, he left everything behind — "*with the exception of the records of my telephone calls.*" Those are not mere logs of calls, of which he took a copy — those are substantive, verbatim transcripts of conversations, of which he took the only copy. Some questions arise:

1. *When were the dead-key scrolls removed from the White House N.S.C. files?* According to Mr. Eagleburger, within a month after Mr. Kissinger's appointment as Secretary of State in 1973. (But Mr. Kissinger continued as National Security Adviser at that time, and left behind his other N.S.C. files — presumably he wanted to get these supersensitive files out of the White House, fast.)

2. *Under what authority did he take them?* Mr. Eagleburger claims he needed no authority — that these four years of records were considered "working papers that can accompany him wherever he goes, as long as he's in Government." And afterward? "I presume he would leave copies behind, but that's a legal question."

3. *Why didn't he leave the originals where they belonged at the N.S.C. and only take copies, if all he wanted was access to "working papers"?* No answer to that. Did Al Haig

walk off with his telephone transcripts, too? Gen. Brent Scowcroft, the present National Security Adviser, will not return calls on these matters; he has probably offered no objection to having the N.S.C. files denuded of all these transcripts.

4. *Who owns these transcripts?* The Justice Department last week won a decision in the Court of Appeals in which Congressional seizure of the papers of the Nixon Presidency was held constitutional. If N.S.C. transcripts are Presidential papers — as they surely are — then, as of now, they belong to the public and not to Henry Kissinger.

5. *Why have these transcripts never been subpoenaed?* Ah, that's the big one. The Special Prosecutor's investigation of the seventeen wiretaps was a joke; the Senate Foreign Relations Committee look-see was a Kissinger whitewash from start to finish; the Church cover-up committee is afraid of what a subpoena might turn up, and the woebegone Pike committee knows that the House won't back up any subpoena.

One ray of light: By removing the dead-key scrolls from the White House, leaving no copies behind, and by dint of the tacit White House approval of the removal to a Government department, Mr. Kissinger has made his years of conversations subject to the Freedom of Information Act. Citizens may rush in where solons fear to tread.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MILITARY AUDIT PROJECT, et al., Plaintiffs,	)	
v.	)	Civil No. 77-0391
DEPARTMENT OF STATE, et al., Defendants.	)	

ANSWER OF
DEFENDANT HENRY A. KISSINGER

Defendant Henry A. Kissinger, by his undersigned attorneys, in answer to the Complaint filed herein says:

FIRST DEFENSE

The Court lacks jurisdiction over the subject matter of this action.

SECOND DEFENSE

Plaintiffs lack standing to maintain this action.

THIRD DEFENSE

The Complaint fails to state a claim upon which relief can be granted.

FOURTH DEFENSE

Answering specifically the allegations contained in the numbered paragraphs of the Complaint, defendant Kissinger admits, denies and otherwise avers as follows:

1. Defendant admits that the action purports to be as

alleged in paragraph 1 of the Complaint.

2. The allegations of paragraph 2 of the Complaint state a conclusion of law to which defendant is not required to respond. To the extent a response is deemed necessary or appropriate, such allegations are denied.

3-4. Defendant lacks knowledge or information sufficient to form a belief as to the allegations of paragraphs 3 and 4 of the Complaint, and accordingly such allegations are denied.

5. The allegations of paragraph 5 of the Complaint state a conclusion of law to which defendant is not required to respond. To the extent a response may be deemed necessary or appropriate, such allegations are denied.

6. Defendant admits that the Department of State is an agency of the United States Government; that Henry A. Kissinger was Secretary of State until January 20, 1977; that Daniel J. Boorstin is the Librarian of Congress; that the documents at issue are held by the Library of Congress; and that James B. Rhoads is the Archivist of the United States. Defendant denies the remaining allegations of paragraph 6 of the Complaint.

7. Defendant admits that a memorandum dated November 11, 1976 was prepared by Monroe Leigh, Esquire, but denies the characterization of the contents of such memorandum set forth in the balance of paragraph 7 of the Complaint.

8. The allegations of paragraph 8 of the Complaint state conclusions of law to which defendant is not required to respond. To the extent a response may be deemed necessary or appropriate, such allegations are denied.

9. Defendant admits that the papers at issue were removed from the Department of State on or about October 29, 1976, and stored in a cleared facility located on private property in the State of New York, and avers that such

records were delivered from that facility to the Library of Congress on or about December 28, 1976. Defendant denies the balance of the allegations of paragraph 9 of the Complaint.

10. Defendant admits that he and Daniel J. Boorstin executed an agreement dated December 24, 1976 relating to the documents at issue and respectfully refers the Court to such document for a statement of its terms. Defendant further admits that he intends to publish his memoirs. The balance of the allegations of paragraph 10 of the Complaint are denied.

11. Defendant admits that the documents at issue were delivered to the Library of Congress between December 27 and December 28, 1976, pursuant to the agreement referred to in paragraph 10 of the Complaint. The balance of the allegations of paragraph 11 of the Complaint are denied.

12. Defendant admits the allegations of paragraph 12 of the Complaint, but respectfully refers the Court to the referenced correspondence for a full and complete statement of contents thereof.

13. The allegations of paragraph 13 of the Complaint state conclusions of law to which defendant is not required to respond. To the extent a response may be deemed necessary or appropriate, such allegations are denied.

Defendant denies each and every allegation of the Complaint not expressly admitted or qualified above.

WHEREFORE, defendant Henry A. Kissinger, having fully answered the allegations of the numbered paragraphs

of the Complaint, prays that the Complaint be dismissed with prejudice and that he be granted his costs.

Respectfully submitted,

/s/ David Ginsburg
David Ginsburg

/s/ James E. Wesner
James E. Wesner

/s/ Martha Jane Shay
Martha Jane Shay

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Attorneys for Defendant
Henry A. Kissinger

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MILITARY AUDIT PROJECT, et al., Plaintiffs, v. DEPARTMENT OF STATE, et al., Defendants.	Civil Action No. 77-0391

ANSWER OF DEFENDANTS DEPARTMENT OF STATE, DANIEL J. BOORSTIN AND JAMES B. RHOADS

Defendants Department of State, Daniel J. Boorstin and James B. Rhoads, by their undersigned attorneys, for their answer to the complaint in the above-entitled action, hereby admit, deny and otherwise aver as follows:

First Defense

Plaintiffs lack standing to maintain the action.

Second Defense

James B. Rhoads is not a proper party to the action.

Third Defense

In answer to the numbered paragraphs of the complaint, defendants Department of State, Boorstin and Rhoads admit, deny and otherwise aver as follows:

1. Deny as plaintiffs' characterization of the action.

2. The allegations of paragraph 2 of the complaint are conclusions of law to which an answer is not required but, insofar as an answer is deemed required, they are denied.

3. Deny as an incomplete portrayal of the correspondence referred to in paragraph 3 of the complaint, except to admit that plaintiffs forwarded a letter to the Department of State dated December 28, 1976 that plaintiffs made a second request dated December 29, 1976 and the Court is respectfully referred to the correspondence for the contents thereof.

4. Deny as an incomplete portrayal of the correspondence referred to in paragraph 4 of the complaint, except to admit that the Department of State denied plaintiff's requests by letter dated January 18, 1977 and that plaintiffs appealed the denial and that the denial was denied on March 4, 1977.

5. Admit.

6. The allegations of paragraph 6 of the complaint are conclusions of law to which an answer is not required, but insofar as an answer is deemed required, they are denied, except to admit that defendant Department of State is an agency and that defendant Henry A. Kissinger was Secretary of State until January 20, 1977 and that defendant Daniel J. Boorstin is the Librarian of Congress and that the transcribed secretarial notes of the phone conversations at issue are held by the Library of Congress and that defendant James B. Rhoads is the Archivist of the United States.

7. Deny as an incomplete portrayal of the memorandum referred to in paragraph 7 of the complaint, except to admit that the Legal Advisor of the Department of State at the time, Monroe Leigh, Esq., prepared a memorandum dated November 11, 1976.

8. The allegations of paragraph 8 of the complaint are conclusions of law to which an answer is not required, but insofar as an answer is deemed required, they are denied.

9. The allegations of paragraph nine of the Complaint are conclusions of law to which an answer is not required,

but if an answer is deemed required, they are denied except to refer to defendants' answer to paragraph six of the Complaint.

10. Deny as an incomplete portrayal of the documents to which reference is made in paragraph 10 of the complaint, except to admit that a Deed of Gift and Agreement, dated December 24, 1976, was executed by defendants Henry A. Kissinger and Daniel J. Boorstin, to which the Court is respectfully referred for a full and complete statement of its provisions.

11. The allegations of paragraph 11 of the complaint are conclusions of law to which an answer is not required, but insofar as an answer is deemed required, they are denied, except to admit that the documents, described in paragraph 6, above, at issue have been physically placed in the Library of Congress.

12. Deny as an incomplete portrayal of an exchange of correspondence and aver that the Archivist of the United States forwarded a letter to defendant Kissinger dated January 4, 1977 and then Legal Adviser of the Department of State Monroe Leigh prepared a memorandum dated January 14, 1977 which discusses the January 4, 1977 letter, to both of which the Court is respectfully referred for a full and complete statement of the contents thereof.

13. The allegations of paragraph 13 of the complaint are conclusions of law to which an answer is not required, but insofar as an answer is deemed required, they are denied.

14. Deny as plaintiffs' characterization of the relief they seek.

Defendants deny each and every allegation of the complaint not expressly admitted or qualified above.

Defendants deny that plaintiffs are entitled to the relief sought by the complaint or to any relief whatsoever.

WHEREFORE defendants pray that the action be dismissed with prejudice and the defendants be granted their costs.

Respectfully submitted,

/s/ Barbara Allen Babcock
BARBARA ALLEN BABCOCK
Assistant Attorney General

EARL J. SILBERT
United States Attorney

/s/ Irwin Goldbloom
IRWIN GOLDBLOOM
Deputy Assistant Attorney General

/s/ Jeffrey Axelrad
JEFFREY AXELRAD

Attorney, Department of Justice
Washington, D.C. 20530
Tel: 202-739-3300

Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, et al., Plaintiffs	)	
v.	)	Civil No. 77-0220
CYRUS R. VANCE, et al., Defendants	)	

AFFIDAVIT OF HENRY A. KISSINGER

HENRY A. KISSINGER, being duly sworn, deposes and says:

1. I am one of the defendants in the above-captioned action. This affidavit states facts within my own knowledge, and is given in support of my Opposition to Plaintiffs' Motion for a Preliminary Injunction.

2. Plaintiffs have suggested that now or in the future I may remove, conceal, misplace, edit, destroy or otherwise injure the telephone transcripts at issue in this case while they are in the possession of the Library of Congress. The suggestion is offensive and false. I donated the notes, together with documents relating to my years in government and earlier periods of my life, to the Library of Congress for the specific purpose of assuring their preservation for future historical purposes. I have altered none of the notes; I have removed none of them; I have not disturbed their arrangement in the files where they are kept; I have no intention of doing so.

3. I have read the regulations of the Library of Congress relating to the use of rare manuscript materials. I have signed the Reader's Agreement relating to compliance with such rules that was supplied to me by the Library of Congress. I am bound by the regulations and agreement, and will abide by them.

4. The facility where the notes are kept at the Library of Congress consists of a storage area and a working area. When I or my assistants visit this facility, we remain in the working area. Files containing the notes are brought to us by a Manuscripts Division staff employee, and reshelved by this employee. An employee is always present in the facility while we are there. We do not ordinarily bring brief cases or other similar items with us to the facility. I am aware that the Library's rules authorize a search of brief cases and like items, and would not object if any such request were made.

5. The Affidavit of William Safire attached to Plaintiffs' Motion for Summary Judgment and, Alternatively, A Preliminary Injunction, refers to a 1971 incident in which Mr. Safire says he was shown a transcript of a telephone conversation between myself and a newspaper reporter that contained handwritten markings appearing to represent modifications of the version of the conversation contained in the transcript. Mr. Safire further states it was his impression that I intended to send the altered transcript to then-President Nixon, and implies that the alterations were designed to portray the contents of the conversations in a more flattering light than would have been the case had the alterations not been made.

6. I have no recollection of the incident described by Mr. Safire. However, Mr. Safire's affidavit is inconsistent with my recollections concerning the manner in which the notes were stored and used. The notes are rough transcriptions of telephone conversations which were stored in my personal files at the offices where I worked while in government. I

did not edit them as they were prepared or at any other time. I read a very few of the transcripts in connection with testimony or legal cases; the remainder, the great bulk of the transcripts, I never read before they were transferred to the Library of Congress.

7. I intend to publish memoirs relating to my years in government. The earliest possible publication date would be the latter part of 1979.

/s/ Henry A. Kissinger
Henry A. Kissinger

[Jurat omitted in printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, et al., Plaintiffs,	)	
v.	)	Civil No. 77-0220
CYRUS R. VANCE, et al., Defendants.	)	

MILITARY AUDIT PROJECT, et al., Plaintiffs,	)	
v.	)	Civil No. 77-0391
DEPARTMENT OF STATE, et al., Defendants.	)	

DEFENDANT HENRY A. KISSINGER'S
STATEMENT OF MATERIAL FACTS
AS TO WHICH THERE IS NO
GENUINE ISSUE TO BE TRIED

Pursuant to Rule 1-9(h) of the Rules of the United States District Court for the District of Columbia, defendant Henry A. Kissinger submits the following Statement of

Material Facts as to Which There Is No Genuine Issue to Be Tried. The portions of the record which support each paragraph in the Statement are contained in the Second Affidavit of Henry A. Kissinger and Affidavit of Monroe Leigh, attached hereto, and in the pleadings and admissions on file herein.

1. Defendant Kissinger served in the White House as Assistant to the President for National Security Affairs from January 20, 1969 until September 22, 1973. From September 22, 1973, until November 3, 1975, he served both as Assistant to the President for National Security Affairs and as Secretary of State. After September 22, 1975 and until January 20, 1977, he was Secretary of State. Second Kissinger Affidavit, ¶ 2.

2. During the foregoing period of defendant Kissinger's government service, secretaries monitored his telephone conversations and took shorthand notes of what was said. Transcriptions of these notes were made and filed in defendant Kissinger's personal files. Second Kissinger Affidavit, ¶3.

3. Defendant Kissinger caused the notes to be made in order to create a rough record of his daily telephone conversations to which he or his immediate staff might refer to follow up on matters discussed orally. The notes were used by his executive secretary to prepare his appointments schedule. They were also read by his Senior Special Assistant to keep abreast of his oral discussions. They were used for no other purpose. Second Kissinger Affidavit, ¶¶ 3, 4.

4. The notes reflect the vast majority of defendant Kissinger's telephone conversations without regard to subject matter or the identity of the other party. They contain details of conversations with friends, legislators, journalists, diplomats, other government officials, Presidents Nixon and Ford, scholars, and others. They are not limited to discussions of official business, but include purely personal

discussions and conversations of a mixed character in which business and personal matters were intermingled. Second Kissinger Affidavit, ¶ 5.

5. Defendant Kissinger regarded the telephone notes as work aids which he could retain or discard as he chose. The notes were not filed among the official records of any agency, but were stored in personal files located in defendant Kissinger's office. They were not circulated outside his office, and only he and his immediate personal staff had access to them. The notes were not edited as they were made, or at any other time, for accuracy and completeness, or to separate personal from official matters. Second Kissinger Affidavit, ¶ 6.

6. Had defendant Kissinger believed the telephone notes would be treated as official records he would have edited them or not made them at all. Given the amount of time required for editing, he probably would not have made or kept the notes. *Id.*

7. The notes are rough memoranda which vary in quality according to the skill of the secretary who made them. Some are substantially verbatim, but others are only rough approximations of what was said. Many contain misspelled names, omissions, garbled passages, and outright errors of transcription. Second Kissinger Affidavit, ¶ 17.

8. Near the end of his term, defendant Kissinger decided to donate his personal papers and copies of official State Department documents upon which he had worked to the Library of Congress. The terms of the donation are stated in a First Deed of Gift and Agreement, dated November 12, 1976, and a Second Deed of Gift and Agreement, dated December 24, 1976. The telephone notes at issue in this litigation are covered by the Second Deed of Gift and Agreement. Second Kissinger Affidavit, ¶ 7; RCFP

Complaint,* Exhibits A and C.

9. The procedures employed in obtaining State Department clearance for the proposed donation are set forth in a Donation Procedures Memoranda, dated November 11, 1976, attached to the Second Kissinger Affidavit. This memorandum was reviewed and approved by Monroe Leigh, the Department of State's Legal Adviser; by Lawrence M. Eagleburger, the Deputy Undersecretary for Management; by John Thomas, the Assistant Secretary for Administration; and by John Pruden, the Director of the Department of State's Documents Center. Second Kissinger Affidavit, ¶ 9; Leigh Affidavit, ¶ 6.

10. The Donation Procedures Memorandum stated that the proposed storage facility at the Library of Congres had been approved by the Department of State's Office of Security (¶ 6), and provided: (1) that defendant Kissinger's working files would be reviewed by Department of State records officers to assure that they contained no original Departmental records (¶ 2); (2) that any personal papers of defendant Kissinger found in the working files would be returned after extracts had been made of official matters contained in the personal papers (¶ 3); and (3) that defendant Kissinger was entitled to retain papers that had been designated and filed as personal from their time of origin or receipt (¶ 5). All of the persons signing the memorandum knew that the telephone notes were included among defendant Kissinger's personal files. Leigh Affidavit, ¶ 7.

11. The State Department's Legal Adviser orally advised defendant Kissinger in early 1976 that the telephone notes were not State Department records, but rather were his pesonal papers which he would be free to retain when he left office. This oral advice was subsequently repeated on a number of occasions thereafter. The substance of the advice is contained in a Memorandum, dated November 11,

*"RCFP Complaint" refers to the amended complaint filed by the plaintiffs in No. 77-0220 herein.

1976, addressed by the Legal Adviser to defendant Kissinger. Second Kissinger Affidavit, ¶ 11; Leigh Affidavit, ¶¶ 2 through 5; RCFP Complaint, Exhibit B.

12. On October 29, 1976, acting in reliance on the oral advice given to him by the Department's Legal Adviser, defendant Kissinger caused the telephone notes to be transferred from his office at the State Department to a vault located on the estate of then Vice President Rockefeller at Pocantico Hills, New York. Second Kissinger Affidavit, ¶ 12.

13. Also acting pursuant to the advice of the Department's Legal Adviser, defendant Kissinger requested the Deputy Undersecretary for Management to review the telephone notes to determine whether any discussions contained in the notes should be extracted and filed as official records. Defendant Kissinger's instructions to the Deputy Undersecretary were that he should read all the telephone notes, including those from the White House period, and extract everything he believed was necessary in order to comply with the regulations and with the Legal Adviser's advice. The extracts were subsequently made and filed with the State Department and the National Security Council. Second Kissinger Affidavit, ¶ 6.

14. On December 28, 1976, the telephone notes were removed from Pocantico Hills and delivered to the Library of Congress. Second Kissinger Affidavit, ¶ 16.

15. The Second Deed of Gift and Agreement, which applies to the telephone notes, restricts public access to the notes during the lives of both parties to the conversations reflected therein. RCFP Complaint, Exhibit C. Defendant Kissinger concluded that this restriction was necessary in order to protect not only his own privacy but the privacy of the persons with whom he spoke. Second Kissinger Affidavit, ¶ 15.

16. On December 28, 1976, the Military Audit Project and its director filed a Freedom of Information Act request with the Department of State seeking access to all of the

telephone notes. MAP Complaint, * ¶ 3. This request was finally denied by the State Department on March 4, 1977. *Id.*, ¶ 4.

17. The Reporters Committee for Freedom of the Press and others filed a Freedom of Information Act request seeking access to all the notes on January 13, 1977. RCFP Complaint, Exhibit H. This request was denied by the Department of State on January 28, 1977. *Id.*, Exhibit I. In its letter of denial, the Department of State informed plaintiffs that extracts had been made from the telephone notes and filed with the Department's records.

18. Plaintiff William Safire's Freedom of Information Act request was filed with the Department of State on January 14, 1976. RCFP Complaint, Exhibit F. Unlike the other request, plaintiff Safire's request sought access only to notes of telephone conversations in which his own name appeared or in which defendant Kissinger and certain other designated individuals discussed the subject of "leaks." Plaintiff Safire's Freedom of Information Act request was finally denied by the Department of State on March 29, 1976. *Id.*, ¶ 46. He did not further press his Freedom of Information Act claims until this litigation began.

Respectfully submitted,

/s/ James E. Wesner
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Lee R. Marks
James E. Wesner
Martha Jane Shay
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Attorneys for Defendant
Henry A. Kissinger

June 17, 1977

*"MAP Complaint" refers to the complaint filed herein in No. 77-0391.

APPENDIX II

DEPARTMENT OF STATE
Washington, D.C. 20520

Memorandum to the National Study Commission on Records and Documents of Federal Officials

This memorandum will describe the practice of the Department of State with respect to the treatment and disposition of papers in the custody of senior officials at the time they retire from office.

Policies

The practice of the Department of State, as well as existing legal authority on the ownership papers held by senior officials, take into account five policy considerations:

1. The overriding need of the Department to retain a complete record of the Department's business and decisions.

2. The need to protect the confidentiality of diplomatic correspondence, intelligence and other national security information, and papers reflecting internal discussions of foreign policy alternatives.

3. The right of a government employee to retain papers of a personal nature or those prepared with the expectation of privacy — e.g., personal correspondence, private diaries.

4. The need of former senior Department officials to have access to their files after retirement, in order to defend their reputations or their conduct in office or to prepare memoirs that will add to the history of a given period.

5. The rights of historians and the public to have

access to appropriate papers. The latter rights are well defended by the Freedom of Information and Privacy Acts.

The foregoing policies, of course, are not always mutually consistent; but the Department attempts to follow practices that take several of these policy considerations into account while protecting the needs of government.

Legal History

Prior to 1950, there were no laws or regulations on what papers a senior official could take with him upon retirement from office. In 1950, Congress passed the Federal Records Act, 44 U.S.C. 3101-3107. It prescribed standards for the maintenance and control of official documents, and required the head of each agency to "establish safeguards against the removal or loss of records he determines to be necessary and required by regulations of the Administrator of General Services."

The Federal Records Act of 1950 relied in part on an earlier statute, the Records Disposal Act of 1943, 44 U.S.C. 3301-3314. In the 1943 Act, the term "record" is defined as including all papers which both (1) were "made or received by an agency of the United States Government under federal law or in connection with the transaction of public business," and (2) have been "preserved or [are] appropriate for preservation . . . as evidence of the policies, decisions, . . . or other activities of the government or because of the informational value of data contained in them." 44 U.S.C. 3301.

Although this legislation provided some general guidance for distinguishing government records from private papers, it was not very explicit. For this reason, the Eisenhower Administration undertook a major study which culminated in a Cabinet Paper dated July 27, 1959, (Tab 1). This Cabinet Paper gives specific guidance and attempts to accommodate many of the policy considerations discussed

above. For example, it states as a general policy that documents not be withdrawn if their withdrawal will "create such a gap in the files of an agency as to disrupt the proper documentation of its activities. . . ." At the same time, however, it provides that personal work aids (e.g., office diaries) that contain information already reflected in actual agency records, can be removed, provided confidential government information is not involved.

Since the 1959 Eisenhower Cabinet Paper, there have been no authoritative standards on the removal of papers which have been applicable to the government at large. The problem, however, has come up in a peripheral way. For example, in July 1975, OMB prepared guidelines on what papers are to be considered "agency records" under the Privacy Act. Although the OMB guidelines are not concerned with retiring officials, they do mention categories of papers which are to be deemed personal:

> "Uncirculated personal notes, papers and records which are retained or discarded at the author's discretion and under which the agency exercises no control or dominion (e.g., personal telephone lists) are not considered to be agency records. . . ." (40 F.R. 28952).

At least one court decision under the Freedom of Information Act expresses a similar view — that where a paper is retained by its author and is not circulated within an agency, it is not an agency record. *Porter County Chapter v. Atomic Energy Commission*, 380 F.Supp. 630 (1974).

The Nixon papers litigation may provide guidelines. A lower court has determined that former President Nixon did not own papers "generated, created, produced or kept in the administration and performance of the powers and duties of the Office of the President." *Nixon v. Sampson*, 389 F.Supp. 107, 145 (1975). This decision, however, is subject to further court review.

Other court decisions of the past 30 years on this problem include *United States v. First Trust Co. of St. Paul*, 251 F.2nd 686 (1958), *Public Affairs. Associates Inc., v. Rickover*, 268 F.Supp. 444 (1967), and *In Re Roosevelt's Will*, 73 N.Y.S.2d 821 (1947).

Department Practice Before 1960

Prior to 1960, it was not uncommon for retiring Department officials to remove large numbers of official documents, particularly extra copies of documents. Many of these officials may have relied on the so-called "extra copy" exception. Under 44 U.S.C. 3301, "extra copies of documents preserved only for convenience of records" are not considered to be government records. Although an "extra copy" of a government record may not itself be a "government record" in a technical sense, this does not end the inquiry. One must also consider whether the government has a proprietary interest in the information contained in the extra copy — particularly where classified information is involved. Thus, the 1959 Eisenhower Cabinet Paper on removal of papers states that "whether or not a Department official may take extra carbons or non-record copies of records should depend largely on whether there is any policy or legal reason why the information contained in them should be regarded as confidential."

It appears that former Department officials who took extra copies and other papers with them upon retirement placed these papers in private institutions which had obtained appropriate security clearances from the government. A list of some of these collections appears at Tab 2. Apart from those mentioned in the list, we note that Christian Herter donated copies of his papers to Eisenhower Library. John Foster Dulles had numerous papers microfilmed at his own expense and deposited the microfilm in an approved security area at Princeton University.

Current Department Regulations

In 1960, pursuant to guidelines in the Eisenhower Cabinet Paper, the Department issued a Foreign Service Circular concerning the disposition of papers in the custody of departing foreign service officers. Subsequently, the Department's regulations were amended to reflect the recommendations in the circular, and these regulations as amended are codified at 5 FAM 400 *et seq.* (Tab 3).

In 1967, Secretary Dean Rusk asked the Legal Adviser to determine if existing laws and regulations were adequate to ensure that the Department retained in its possession a complete record of the Department's business and decisions. As a result of this study, the Department's regulations were further strengthened. It should also be noted that Secretary Rusk personally encouraged senior officials to leave all official records in the custody of the Department.

Certain provisions of the Department's regulations on records (Tab 3) deserve special note. Under 5 FAM 417.1, it is assumed that unless a paper "in an employee's office" has been "explicitly designated or filed as personal at the time of origin or receipt," the paper is a Department record which cannot be removed without the approval of the Director of the Department's document center. This regulation is to encourage Department employees and officials to segregate official from personal materials from the time a document is originated.

As indicated in 5 FAM 417.2, every departing official is required to execute a separation statement (Tab 4), in which the departing official attests that he has not removed official records or other documents that contain classified information. Under 5 FAM 417.3, provision is made for retiring officials to apply to have certain papers declassified for the purpose of removal from the Department.

Thus, the Department's regulations take several policy considerations into account. First, they attempt to maintain

exclusive control over all records of Department business, as well as copies of records which contain classified information. Second, papers designated or filed as "personal" at the time of origin or receipt are presumed to be papers in which the individual has the dominant interest — and thus may retain. If a paper has *not* been treated as "personal" from the start, it will be deemed a government document, with one exception. This exception is where the Department's document center reviews a paper, finds that it contains personal matter, and approves its removal. See 5 FAM 417.1(b).

Third, even if a paper has been filed as personal or contains personal matter, Department employees are required to extract, and to make a part of the officials records, portions of the paper which discuss official policy matters. See 5 FAM 417.1(b) and 432. In practice, this extract requirement is applied to papers containing a discussion of Department activities or decisions not otherwise reflected in existing Department records. In other words, until such official material is extracted for the Department's records, the Department has a predominant interest in the paper that is otherwise personal.

Fourth, irrespective of whether official matters have been extracted from a paper containing personal material, the Department has a predominant interest in the storage of a paper containing classified information. The Department has final authority over how and where *all* papers held by Department employees and containing classified information are kept. To help assure such control, the Department has developed a "senior official" rule, to which we now turn.

Access by Senior Officials

One of the major inducements the Department uses to ensure that records are not removed is to provide retired senior officials access to their files for as long as such access

is desired and the former official's security clearance is maintained. This access is provided under 5 FAM 946, which was promulgated pursuant to section 12 of the Executive Order 11652 (see Tab 3).

Under this "senior official" rule, the Department stores the papers used by a former official in so-called "VIP" files, which are kept as a single collection bearing the former official's name. These files are deemd to be a part of the central files that is merely segregated. With respect to lower level officials, their files of interest are usually maintained as part of the inactive materials retired from individual Department bureaus or foreign service overseas posts.

The "senior official" rule began in practice in 1960, when retiring officials were encouraged to leave their files to the Department or to deposit them with a Presidential library. Secretary of State Rusk was one of the first officials whose files were placed in a separate storage area in the Department. Secretary Rogers' files are also stored in this manner.

With the exception of a former Assistant Secretary for African Affairs, no senior official since 1960 has been authorized to remove his files and to store them outside the Department. Conceivably, in a case of unusual need, files could be stored in a secure storage area outside of the Department, provided (a) the applicable security requirements were satisfied and (b) the friles to be transferred contained only copies of records and not the actual records on which the Department must rely. Such removal of copies of records in cases of special need is contemplated in the 1959 Eisenhower Cabinet Paper. In construing the predecessor of section 12 of Executive Order 11652 (*viz.* Executive Orders 10501 and 10816), it states:

> "[This section] does not permit the removal of classified records from the possession of the Government, but the agency head concerned may,

in his discretion, permit persons granted access to classified information under the new subparagraph to acquire or reproduce, and retain in the custody, extra copies of those classified records if those persons arrange for the proper safeguards thereof. The agency head involved shall assure that title to the copies will remain in the United States until such time as the information contained therein has been officially declassified under the provisions of Executive Order No. 10501 and until the agency head otherwise determines that the interests of the United States permit the transfer of title to the copies to nongovernmental custodians."

The Department believes that its "senior official" rule should be continued. It assures the Department of control over all necessary records while providing access to former officials who are writing memoirs or who must defend, or give information concerning, their activities in office.

Historical Review

All Department records, including files of senior officials, are reviewed by the Department's historical office at about 20 years from the date of origination. For example, in about 1980, Department historians will review all Department records dating from 1960, with a view to publishing any documents that can then be declassified. Documents of historical value that can be declassified are then published in the Department's multi-volume work, *Foreign Relations of the United States.*

Once this historical review is complete, original documents from the period under review would be transferred to the National Archives. Restrictions would be maintained on documents which could not be declassified. With respect to the collected files of senior officials, these would probably be transferred to the National Archives as

single collections approximately 20 years following the official's retirement from office. Thus, if an official retired in 1969, his files might be transferred to the National Archives in about 1989.

Public Access

Apart from information contained in the Department's publications (Tab 5), both historicans and the public at large may seek access to documents under the Freedom of Information and Privacy Acts. The Department in 1975 received 1,812 Freedom of Information Act requests. It granted 770 in their entirety and 290 in part; 126 were denied in full (see Tab 6). The Department has determined that these requests resulted in a financial burden on the Department of approximately $1 million in direct labor costs alone (see Tab 7).

Problem Areas

1. The Department's success in maintaining control over records held by senior officials has depended more on persuasion and good faith than on compulsion. Indeed, apart from the extreme step of informing the Department of Justice of a possible criminal violation under 18 U.S.C. 641 or 2017, there is no enforcement mechanism available. As in most agencies, the records officer of the Department cannot formally compel compliance by senior officials.

Nevertheless, the information compliance procedures in the Department have been very successful. Persons in positions of responsibility invariably act in good faith when advised of the applicable laws and regulations. However, the Commission might consider what further procedures and safeguards should exist for the rare case of disagreement as to what papers can be removed.

2. A comprehensive set of rules for distinguishing personal from official papers needs to be fashioned for the en-

tire government. At present, the rules appear to vary from agency to agency. To fashion a set of rules, one must identify and consider each of the interests at stake in various categories of paper — i.e., personal correspondence containing official material, personal letters mixed with official files, extra copies of official records, papers as to which expectations of privacy exist (e.g., a personal diary discussing one's personal involvement in government activities). No simple formula could take into account all of the policy considerations mentioned at the beginning of this memorandum.

3. Further study is needed concerning the classification and declassification of government information. At present, an NSC review group is considering this problem in the context of a possible revision of Executive Order 11652. Perhaps the Commission should await the outcome of the NSC review before deciding whether to include this problem in its investigation.

Records of Former Senior Officials
in the Possession of
Private Institutions

Hoover Institute for War and Revolution
Stanford, California

Princeton University
Dulles, Stevenson

Delaware University
Messersmith

University of Virginia
Stettinius

University of Michigan
G. Williams (thru FADRC)

Library of Congress
C. Hull

Harvard University
Grew

Clemson University
Sec. Burns

APPENDIX III

GENERAL SERVICES ADMINISTRATION

Aug 2 1976

Honorable Herbert Brownell
Chairman, National Study Commission on
Records and Documents of Federal Officials
Room 1127
Department of Justice
Washington, DC 20530

Dear Mr. Brownell:

Thank you for your letter of June 13, 1976, regarding the control, preservation, and disposition of records by GSA officials. Responses to your questions are provided below:

a. *Policies.* GSA has established its policy for the maintenance and disposition of all GSA records in the GSA Policy Manual, 2-86 (ADM P 1000.2B) (see Enclosure 1). This policy is implemented by the handbook, GSA Records Maintenance and Disposition System (OAD P 1820.2). Relevant chapters are included in Enclosure 2.

(1) The GSA records system provides for the maintenance of disposition of all GSA records, including those of senior officials. It is a functional files system which requires the maintenance of official files to document GSA functions and programs at the office level where the particular function or program is being performed. For instance, maintenance and disposition of supervisory or singatory officials' files, including the Administrator's official files, are provided for in Appendix D of chapter 9 of OAD P 1820.2 (see Enclosure 2).

(2) The need to protect the confidentiality of sensitive information is provided for retired records by the GSA records system. A senior GSA official has responsibility for the current records which document the function for which he is responsible. Therefore, he controls access to those

records. He is also responsible for the protection of sensitive information contained in such records, according to GSA Order OAD 1800.1, Safeguarding privileged and sensitive nondefense information (see Enclosure 3). GSA continues to control access to its records maintained in Federal records centers for as long as the records exist.

(3) Senior officials may maintain personal records separately from official files and may remove them when they retire from office. However, if they are personal records they are not subject to the Privacy Act of 1974. Therefore, when such files include personal information on other individuals there is no guarantee of personal privacy.

(4) To our knowledge, former GSA senior officials have never requested access to their files after leaving office. If the GSA Records Officer were to receive such a request, he would ask for the approval of the incumbent official responsible for the records. Also, such access is subject to GSA Order ADM 7900.3, GSA regulations pursuant to "Freedom of Information Act" (Enclosure 4), and GSA Order ADM 7900.4, GSA regulations implementing the Privacy Act of 1974 (Enclosure 5).

(5) Any requests from the public and historians are also subject to the requirements cited in subparagraph (4) above.

b. *Internal agency regulations and procedures.* Internal agency regulations and procedures for identifying, maintaining, and disposing of records are provided for in the handbook, GSA Records Maintenance and Disposition System (OAD P 1820.2). This functional files system is designed to cover all official files of GSA, including those of senior officials.

c. *Access to agency records.* All requests for access to agency records are limited by the following listed GSA regulations and they apply to all present and former employees, including senior officials. They also apply to

private citizens and private sector organizations.

(1) GSA Order, Safeguarding privileged and sensitive non-defense information (Enclosure 3).

(2) Handbook, GSA Records Maintenance and Disposition System, Figure 4-2 (Part 2 of 3) of chapter 4 for retired records (Enclosure 2).

(3) GSA Order, GSA regulations pursuant to "Freedom of Information Act" (Enclosure 5).

(4) GSA Order, GSA regulations implementing the Privacy Act of 1974 (Enclosure 4).

d. *Summary of implementation of the Privacy Act of 1974.*

(1) The following is a summary of GSA actions to implement and administer the provisions of the Privacy Act of 1974 (5 U.S.C. 552a).

(a) A GSA Privacy Board was established in March 1975 to provide the attention and support of top management to ensure that information practices followed in GSA were consistent with the overall goal of protecting the individual's right to privacy, and to develop and maintain a privacy action plan for attaining this goal. Membership on the Board included the Head of each Service and Staff Office and the Administrator of Region 3 to represent the Administrators of the 10 GSA regions. In October 1975 the Board concluded that they had completed their mission since the Privacy Act had been successfully implemented throughout GSA. The Board was then abolished and the Director of Administration was assigned the responsibility of administering the Privacy Act within GSA. In addition, a Privacy Act Officer and Alternate Privacy Act Officer were designated within each of the services, staff offices, and regions to assist Heads of Services and Staff Offices and Regional Administrators in overseeing administration of the act within their assigned areas of jurisdiction.

(b) A GSA Privacy Action Plan was developed to accomplish the inventorying of all systems of records, preparing notices for the Federal Register, training employees, publishing Agency rules, revising Agency internal administrative procedures, and initiating physical security controls.

(c) The cost of implementing the Privacy Act within GSA during fiscal year 1976 has been estimated at $1.1 million which included personnel costs of $917,000 for 89,000 man-hours, $115,000 for supplies, equipment, space, and $77,000 for printing. GSA has established a GS-13 position to coordinate the implementation of the Privacy Act.

(2) GSA has reported 90 systems of records subject to the provisions of the Privacy Act. As the major portion of these systems of records contains information only on GSA employees, there has been little noticeable effect by GSA's implementation of the act upon the general public.

(3) Except for the Office of Investigations, offices throughout GSA have reported that generally there has been no change in the quality or quantity of information available to make program decisions, no improvement or decline in response rates to questionnaires, no change in the quality or completeness of responses, and no change in the willingness of third parties to respond to requests or to request pledges of confidentiality. The Office of Investigations has reported several instances where individuals have been reluctant to complete personal history statements. There has also been a marked increase in the number of third parties who refuse to respond to requests for information on another individual, particularly from educational institutions, police authorities, and employers.

(4) As appropriate routine uses were included in the GSA notices of systems of records to permit transfers of information for purposes compatible with the purpose for

which the information is collected, there has been little effect on disclosures from agency records to the public and to State and local governments. Any limitations have usually occurred with respect to credit agencies and prospective employers.

(5) Most of the GSA's systems of records are employee oriented. These records were generally available to the employee prior to implementation of the Privacy Act. No statistical records were kept either prior to or after the implementation of the Privacy Act on the number of access requests to most systems of records. Many of the records constituting part of a system of records are records continually in use during the week, such as time cards. To create a statistical record of the number of employee access requests to these types of records would create a burdensome system. Therefore, the following statistical information on access requests does not include those oral requests an employee makes for access to his records which are maintained in his immediate working area:

(a) During the period from September 27, 1975, to December 31, 1975, there were an estimated 3,406 requests for access to nonexempt systems, primarily to employees' personnel folders, and 19 requests to exempt systems.

(b) The current level of requests is essentially the same as that experienced prior to the effective date of the act. There was a surge of requests initially after the effective date of the Privacy Act, but this has now leveled off.

(6) Generally there has been an increase in the workload of maintaining and servicing records and in paperwork due to the use of separate Privacy Act statements in conjunction with solicitation forms. In addition, the following specific effects were noted:

(a) The Office of General Counsel reported a large increase in the areas of counseling other services and staff offices;

(b) The Office of Investigations reported they were finding in the investigatory process an ever increasing reluctance on the part of persons interviewed to provide information concerning another individual and that their experience has shown that people, when interviewed, are inclined to provide only favorable information;

(c) The Automated Data and Telecommunications Service reported that they have spent a considerable amount of program time in consulting with and assisting customer agencies in implementing the provisions of the Privacy Act; and

(d) The National Archives and Records Service issued publication guidelines for the Privacy Act of 1974 to assist agencies in implementing the Privacy Act and arranged to publish all public notices in the Federal Register.

e. *Summary of the implementation of the Freedom of Information Act.* GSA Order ADM 7900.3, GSA Regulations Pursuant to "Freedom of Infomation Act," was revised February 21, 1975, to incorporate the Freedom of Information Act Amendments of 1974.

(1) The Information Division, Office of Public Affairs, Office of the Administrator, and the Offices of Business Affairs in each of the 10 regions have been designated as coordinators of Freedom of Information (FOI) requests. The office in possession of the information requested provides responses to inquiries while the coordinating offices serve as expeditors and control points. The Director of Information is the GSA Freedom of Information Officer. He processes FOI appeals on behalf of the Deputy Administrator, who has final denial authority.

(2) The 1974 amendments have had a considerable impact on the manhours devoted to FOI matters. During the calendar year 1975 GSA received 2,713 FOI requests which

cost $34,422 to process. Of these requests, 73 were denied. No additional personnel have been employed to process the growing FOI burden; however, there is a continuing effort to develop expertise among the employees who handle such requests.

f. *Problem areas.*

(1) There is no established government-wide definition of personal records. Official GSA records are identified by the GSA records system. Personal records are presently considered to be simply those records which are not official. However, some records may contain both personal and official information in the same correspondence. Also, it is not certain whether extra information copies of official records which a GSA employee may keep in his files may be considered personal. Agency records officers need a definition of personal records to enable them to provide adequate assistance to senior officials.

(2) Compliance with GSA regulations regarding maintenance, protection, and disposition of records by senior officials is ultimately the decision of the senior official himself. The GSA Records Officer, as his subordinate, can inform the official of GSA regulations and procedures concerning official records. Senior officials are generally very willing to comply. The Records Officer does not know whether a senior official has placed all his official records in the official file. It is possible that the official may be the only individual who knows of the existence of a record. Government-wide regulations and procedures might be effective in ensuring maintenance and protection of official records at this level.

Sincerely,

/S/G.C. Gardner
G.C. GARDNER
Director of Administration

Enclosures.

DEPARTMENT OF DEFENSE

PAPERS OF TOP OFFICIALS

Interim Report by the Department of Defense

In accordance with the conclusions reached at the March 11 meeting of the Public Documents Commission, key components of the Department of Defense were asked to report on current regulations, policies, and procedures affecting their records management programs. The purpose of the reports was to provide background information for the Commission's staff on existing practices as well as information on the handling of the papers of top officials — one of the major concerns of the Commission. While the reports themselves, supplemented by extensive documentation, are being forwarded to the Commission's staff,a preliminary summary of the information on the handling of the papers of top officials might be appropriate.

Presidential civilian appointees are briefed upon assuming office in the statutory provisions relating to "official records" and on the importance of keeping separate files for personal and official papers. They are told that the removal of classified documents or those pertaining to public business is prohibited by law, but that diaries, logs, memoranda of personal telephone calls, etc., which do not contain reference to official business, belong to the statutory official as personal or private material and may be removed. They are warned that the very nature of the job and the background of the statutory appointee often result in correspondence of a mixed character and that in such cases all official material should be excerpted from the personal correspondence and made a part of the official file. This information is provided in the personal briefing book prepared for each statutory appointee and is sometimes supplemented by oral briefings of the appointee or members of his staff.

While in office, statutory appointees are usually supported by continuing administrative offices, which make copies of incoming papers, except for those addressed personally to these officials, and retain these copies in the "central files" of the respective offices.

Upon leaving office, practically all Presidential appointees have no difficulties in identifying their personal or private papers, since they have been kept in separate files during their incumbency. In some cases, statutory appointees wish to remove "extra" copies of papers documenting their major activities while in office. When such a compilation is assembled, special care is taken that no "record" material is included. The "nonrecord" material used for this purpose includes, as defined by the Records Disposal Act of 1943 and its successor, the Federal Records Act of 1950, extra copies of documents preserved only for convenience, such as (1) "reading files" copies of correspondence, (2) "tickler," "follow-up," or "suspense" copies of correspondence, (3) identical duplicate copies of all documents maintained in the same file, and (4) extra copies of printed or processed materials of which official copies have been retained for purposes of record. (Enclosure 1 gives the Navy's definition of nonrecord material.)

The removal of such a compilation by a departing appointee is complicated, particularly in the Department of Defense, by the classification of a substantial number of the documents, even after review for declassification. Continued protection has to be provided for all classified material as well as for information of a privileged or "For Official Use Only" nature that is not generally available to private citizens. (Note Enclosure 2, "Information to Guide Presidential Appointees on the Removal of Documentary Materials and Papers.)

The solutions of these problems include primarily donation of these papers to a Presidential library or leaving

the collection in the custody of the appointee's department. In either case, the collection remains under the security control of the U.S. Government, exercised by the National Archives and the department concerned.

Future access to such material by the former appointee is facilitated by Section 12 of Executive Order 11652:

> "The requirement in Section 6(a) that access to classified information or material be granted only as is necessary for the performance of one's duties shall not apply to persons outside the executive branch . . . who have previously occupied policy-making positions to which they were appointed by the President. . . . "

Military officials in top positions have been familiar with the statutory provisions relating to official records throughout their career. Special efforts are made by the military services to have them deposit their papers with the historical office of their service. (See Enclosure 3 for sample solicitations.)

In summary, existing procedures for the handling of papers of top officials have worked satisfactorily in the great majority of cases. The problems that have been encountered from time to time include:

1. The absence of clear guidelines from higher authority on the removal of papers by retiring officials. (Such guidelines affecting only department and agency heads of the Eisenhower Administration were issued in 1959 as a Cabinet Paper.)

2. The inclusion in personal papers of not only strictly private material but also of "extra" copies documenting major activities, raising the possibility of accidental release of classified or privileged information.

3. While retiring officials are now solicited to deposit their papers with a Presidential library or the historical office of their department and most follow this course, more might take advantage of this procedure if their future access to the classified items in such papers were extended beyond the Presidential-appointee category.

Enclosure 1

Nonrecord Material

(Definition from SECNAVINST P5212.5B, Part I, Appendix G, Glossary of Terms)

20. Materials that have no documentary or evidential value and that need not be filed. These are accumulated in the process of producing records, but they never acquire a "record" character:

a. stocks of publications and other reproduced documents maintained for supply purposes;

b. materials preserved solely for purposes of reference or exhibition in libraries or museums;

c. duplicate copies of material maintained within the same organization when serving the same functional purpose;

d. copies of reproduced or processed materials when other copies are retained elsewhere for official record purposes;

e. extra copies of papers preserved solely for convenience of reference, e.g., reading files, and "follow-up" or "tickler" or "suspense" copies of materials that may be destroyed after a brief period; abstracts or briefs of material maintained for tickler purposes;

f. privately purchased books and other papers relating to private personal matters and kept in an office only for convenience;

g. correspondence and other records of transitory value that have neither evidential nor informational value after action has been completed or that are received for information and require no action. Some examples of this nonrecord category are:

1. published materials received from other activities or offices requiring no action and not required for documen-

tary purposes, provided official record copies are retained by the originating office or activity;

2. letters or other transmitting papers that add no significant information to the material submitted;

3. catalogs, trade journals, and other documents or papers received from other Government agencies, commercial firms, or private institutions, that require no action and are not a part of a case upon which action is taken;

4. working papers, preliminary or intermediate drafts, reports and related papers, memoranda, preliminary worksheets or notes and similar materials that are summarized in final or other form and that have no evidential or informational value once action has been completed since they do not relate to significant steps taken in preparing record copies of documents;

5. reproduction materials such as stencils, hectograph masters, and offset plates;

6. shorthand notes, stenographic notebooks, and stenotype tapes that have been transcribed;

7. information copies of correspondence and memoranda and other papers that require no administrative action; ministrative action;

8. notices or other papers that are not the basis for official action;

9. charts, diagrams, and other graphic materials, prepared from source material and used for briefings or training activities;

10. statistical tabulating aids used incidentally in the documenting process;

11. routine records used to control or facilitate actions;

12. personal work papers, such as notes, rough drafts, cards, etc.

13. library material: publications and other materials maintained by libraries *exclusively for reference purposes.*

(Some activities transfer their "record" copies of publications or research reports to their libraries where they are retained for the activities and may also be used for reference purposes. The fact that these are maintained in libraries rather than in the official files does not change the record character of publications so transferred; these still remain "record" material.)

Enclosure 2

INFORMATION TO GUIDE PRESIDENTIAL APPOINTEES ON THE REMOVAL OF DOCUMENTARY MATERIALS AND PAPERS

1. When a Presidential Appointee leaves office, the question arises whether he may take any papers or documentary materials with him as he returns to private life. Information herein is provided as a guide for these officials under such circumstances.

2. While in some instances, to be discussed hereafter, there is room for latitude in making specific determinations in regard to papers or other materials that legitimately may be removed by an outgoing Presidential Appointee, discretion must be exercised. The removal of materials, moreover, must be documented in a record sent to the SECNAV official file room for permanent retention. Some points to be considered before removing records or other materials are:

a. *Definition of Official Records.* Official "records," as defined in 44 USC 3301, are any documentary materials, regardless of physical form or characteristics, made or received by any agency or department in pursuance of Federal law or in connection with the transaction of public business, and which are evidence of, or give continuity to, the organization, functions, decisions, policies, operations, procedures, and other activities of the department, or contain data of informational value. Some evidence or information concerning these matters is contained in practically all documents received or created. Hence, these documents should not be removed, particularly if their removal will create a "gap" in the documentation of the department's business transactions or its history.

b. *Statutory Prohibitions Against Removal.* There are statutory prohibitions against the removal of (1) official records, as defined above, (2) records or information

security classified under provisions of Executive Order 11652, and (3) specific categories of Government records, such as cryptographic materials, income tax returns, social security records, patent records (covered by special statutes). Removal or unlawful destruction of any of these is prohibited and is punishable as a criminal offense under 18 USC 2071, which reads pertinently:

"Whoever, having the custody of any such record, proceeding, map, book, document, paper, or other thing, wilfully and unlawfully conceals, removes, mutilates, obliterates, falsifies, or destroys the same, shall be fined not more than $2,000 or imprisoned not more than three years, or both; and shall forfeit his office and be disqualified from holding any office under the United States."

c. *Extra Copies.* Carbons or other reproduced copies, as well as original documents, are records. Whether "extra" copies, which may have been maintained for convenience of reference, are removable depends largely upon whether there is policy or legal reasons that the information they contain should be of a privileged or "For Official Use Only" (FOUO) nature, and therefore not generally available to the public or a private citizen. If the material is privileged or FOUO, it belongs to the Government and not to the official involved. Officials should be discreet, therefore, in removing "extra" copies, if they may contain information not generally available to a private citizen. Again, the removal of such material should be documented.

d. *Privileged Papers.* Privileged papers, such as copies of Cabinet and National Security Council papers, should not be removed. If an outgoing official has reason to retain such documents, he must obtain prior approval of the Secretary of the National Security Council, as appropriate, and also of the incumbent head of his agency (i.e., Secretary of Defense or Secretary of the Navy), who officially is charged with possession of the papers.

e. *Classified Documents.* As already noted, removal of classfified documents is prohibited. However, if the outgoing official wishes to remove copies of classified documents, he may request that the material or information be reviewed for possible declassification under established procedures, in compliance with Federal regulations and Executive Order. Once declassified, normal rules with respect to removal apply.

f. *Gossipy Material.* Material that by its very nature is gossipy or frivolous, or might cause embarrassment if disclosed, should be purged from the files.

g. *Personal Papers and Diaries.* Papers that are purely personal, of course, may be removed. These include papers, such as correspondence and notes, received and originated or signed by the official essentially as a private citizen, in contrast to those he receives or signs as an agency official. Also included in this category are personal diaries, provided the diary is not in fact a collection of Government documents and information.

h. *Office Diaries.* Office diaries, logs, and the official's own memoranda of conferences "usually" are removable, provided the materials are not privileged or "For Official Use Only," and their removal does not leave a gap in the agency's history.

i. *Personal-Official Papers.* As stated, strictly personal papers may be removed; but some papers are a mixture of official and personal business. Hence, judgment should be used in removing "mixed" papers, to insure that the official record is not removed. Again, the removal of any material withdrawn should be documented.

3. Personnel of the Naval Records Management Division (Op-09B1) are available to assist the staffs of the Secretary and his Civilian Executive Assistants in resolving questions or problems in this area which may arise.

FEDERAL TRADE COMMISSION
Washington, D.C. 20580

OFFICE OF THE GENERAL COUNSEL

08 Sep 1976

Mr. Herbert Brownell, Chairman
National Study Commission on Records
and Documents of Federal Officials
Department of Justice
Room 1127
Washington, D.C. 20530

Dear Mr. Brownell:

This is in response to your letter of June 18, 1976, regarding the control and disposition of Federal Trade Commission documents. The following are the answers to the numbered questions contained in your letter:

1. It has been customary for Commissioners and other agency employees to remove papers they consider personal from their files at the time that they leave the agency. They have also been permitted to retain copies of documents constituting their work product, leaving the original in the agency's files.

   A. Because employees are permitted to remove only personal papers and copies of other documents, the Commission does retain a complete record of its official business.

   B. The Commission expects former employees to observe ethical obligations not to disclose nonpublic agency documents outside the agency. On only one occasion has the Commission initiated disciplinary proceedings against a former employee for the alleged improper disclosure of an agency document. See *Charlton v. FTC,* Civil Action No. 1926-73 (D.C. Cir. 1976).

C. The regulations adopted by the Commission pursuant to the Privacy Act of 1974 protect the privacy of personal information concerning agency employees by limiting the distribution of files containing personal information within the agency. It is expected that former employees will not violate their ethical obligations by removing such files when they leave the Commission.

D. Former officials may obtain access to Commission files only by submitting a request for access pursuant to the Freedom of Information Act and the Commission's regulations thereunder.

E. Historians and other members of the public may obtain access to Commission files only by submitting a request under the Freedom of Information Act and the Commission's regulations thereunder.

2. The Commission has never issued formal regulations or operating procedures specifically concerning the removal of documents by departing employees. It is expected, however, that they will meet the general standards set forth in the regulations for current employees. 16 C.F.R. §§ 0.735-14, 15. The procedures governing requests for access to Federal Trade Commission files under the Freedom of Information Act are found at 16 C.F.R. § 4.11. Requests for access to personal information in the Commission's files under the Privacy Act of 1974 are found at 16 C.F.R. §4.13(c). Copies of these regulations are enclosed for your information. On March 13, 1974, the Commission also made a public announcement of a new "openness" policy designed to increase the amount of information available to the public. A copy of the press release which announced the openness policy is enclosed. Finally, the Commission has determined to

make available to the public motions to quash compulsory process issued by the Commission and requests by former employees for clearance to participate in agency proceedings, and the responses to such motions and requests.

3. The same limitations on access to Federal Trade Commission files apply to former officials and members of the public generally. Records which do not qualify under one of the Freedom of Information Act's exemptions from mandatory disclosure are released upon request. Requests for exempt materials are initially denied, but will be considered by the Commission upon receipt of an appeal from that initial denial. Such appeals, including the possible exercise by the Commission of its discretion to release records notwithstanding their exempt status, are decided by the Commission on a case-by-case basis.

Present employees are permitted access to any Commission records containing information which would aid in the performance of their official duties. The major exception to this rule is the restriction placed on access to information collected in connection with certain of the Commission's statistical reporting programs, such as the Line-of-Business Reports. Such information collected from various corporations is subject to very strict control so that it cannot be used by Federal Trade Commission personnel other than those preparing the reports. An example of the types of regulations which govern the handling of such information are the Line of Business Regulations published at 41 Fed. Reg. 28041 (1976). A copy of those regulations is enclosed.

4. Implementation of the Freedom of Information Act has required the creation of a separate branch within

the Office of the Secretary to process access requests at the initial level. In calendar year 1975, this branch processed five hundred and twenty nine (529) initial requests. The Office of the General Counsel devoted approximately 25% of its time to the processing of one hundred and sixty one (161) administrative appeals and thirteen (13) Information Act lawsuits filed during that year. The cost of administering the Freedom of Information Act in 1975 was approximately $420,000, an increase of approximately $280,000 over the 1974 cost.

With respect to the Privacy Act, this agency has had a total of three hundred and ninety seven (397) requests for access to records within the Commission's systems for the period September 27, 1975, to July 31, 1976. The overwhelming majority of these requests were made by Commission employees seeking access to their personnel files. The Commission has been able to satisfy the requirements of the Act with its existing structure; it has added Privacy Act responsibilities to those components already responsible for Freedom of Information Act matters. The Commission is currently preparing a report on Privacy Act implementation costs, pursuant to OMB Bulletin No. TQ-1. These data will be available by August 31, 1976.

5. The most serious records problem facing the Federal Trade Commission is simply handling the ever-increasing volume and complexity of access requests under the Freedom of Information Act. It is expected that requests pursuant of the Privacy Act of 1974 will also increase, although the impact on this agency's operations will not be as dramatic.

I hope that this information will aid your efforts. Please let me know if I can provide any additional information which might be useful to your Commission.

Sincerely,

/s/ Barry J. Cutler
Barry J. Cutler
Assistant General Counsel

Enclosures

UNITED STATES CIVIL SERVICE COMMISSION
Washington, D.C. 20415

IN REPLY PLEASE REFERTO
ADM 5-7-2

Jul 27 1976

Honorable Herbert Brownell
Chairman, National Study Commission on Records
and Documents of Federal Officials
Justice Department
Room 1127
Washington, D.C. 20530

Dear Mr. Brownell:

This letter is in reply to your request of June 18, 1976, for assistance in your investigation of the problems of control, preservation and disposition of documents of federal officials.

Items 1 and 2

The Commission permits removal of personal papers by senior officials upon their retirement. We use the guidelines provided by the National Archives and Records Service (NARS) in November, 1972, to distinguish between personal papers and official records. The NARS guidelines define personal papers as follows:

> Personal papers of a Government official are the files he had organized and maintained for his own personal use, but they must be distinguished from official records. Federal law defines official records as those preserved by an agency, or appropriate for preservation by an agency, as "evidence of the organization, function, policies, decisions, procedures, operations, or other activities of Government or because of the informational value of data in them" (44 USC 3300). The law requires that certain procedures be followed for the preservation or disposal of official records; they may be disposed of only

with the approval of the Administrator of General Services.

Subject to these criteria, personal papers may include all or some of the following:

1. Personal correspondence of the official which does not directly concern the work of his office and which is not intended to be a part of the official records of the office.
2. Working drafts and notes, used and unused; notebooks.
3. Appointment calendars; logs of telephone calls.
4. Speeches, extra copies; draft of speeches; related correspondence.
5. Journals, diaries, scrapbooks, and press clippings.
6. Press releases issued by the office, extra copies.
7. Directories or lists of persons and positions in the office.
8. Personal photographs, motion pictures, and sound recordings.

A Government official customarily accumulates extra copies of Government documents for convenience of reference. Many of these documents are papers that he has drafted, reviewed, or otherwise taken action on. They are evidence of his contribution to the agency and its programs. The official may retain such papers, provided that they are eligible for disposition under Federal law as extra copies (44 USC 3301), and also provided that the agency records officer raises no objection to their designation as such.

The Commission's records management staff provides, upon request, assistance in distinguishing personal from official papers. The NARS guidelines have not yet been incorporated into our internal regulations.

Item 3

Agency regulations on access to Commission records are based on the requirements of the Freedom of Information and Privacy Acts. These regulations cover equally former senior officials, present and former employees of all levels, and private citizens and private sector organizations. Regulations concerning the Freedom of Information Act are contained in Part 294 (enclosure 1) of the Federal Personnel Manual Supplement 990-1. Parts 293 (enclosure 2) and 297 (enclosure 3) contain our regulations involving the Privacy Act.

Included in this package is a copy of our Index to Civil Service Commission Information (enclosure 4). The Commission's library is responsible for the Index. In addition to the Index, the library provides certain other information services. These services are as detailed in our Administrative Manual Chapter 179 (enclosure 5).

Item 4

During Calendar Year 1975, the Commission processed 500 Privacy Act requests. We have no statistics on the number of Freedom of Information Act requests processed in Calendar Year 1975. The overall cost (direct labor, indirect labor and other costs) for administering the Privacy Act for twelve months of this Fiscal Year ending June 30, 1976, was approximately $552,000. The overall cost for the Freedom of Information Act was approximately $331,000. For your further information, we have attached our Calendar Year 1975 reports on the Privacy Act (enclosure 6) and the Freedom of Information Act (enclosure 7).

Sincerely yours,

James C. Spry, Executive Assistant to the Commissioners

Enclosure 7

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
Washington, D.C. 20240

Mr. Herbert Brownell, Chairman
National Study Commission on Records
and Documents of Federal Officials
Department of Justice, Room 1127
Washington, D.C. 20530

Dear Mr. Brownell:

This is in response to your letter of June 18, 1976, which requested information concerning policies and practices of the Department of the Interior with respect to the disposition of papers in the custody of senior officials when they leave office; limitations on access to agency records by former officials, present employees, and private citizens; experience in implementation of the Freedom of Information and Privacy Acts; and any specific problems encountered with respect to the disposition of official records and documents.

The requested information is enclosed in the desired form of descriptive statements, with accompanying pertinent exhibits. We are pleased to be of assistance in your study.

Sincerely yours,

/s/ Richard R. Hite
Deputy Assistant Secretary —
Management

Attachments

INFORMATION FOR THE NATIONAL STUDY COMMISSION ON RECORDS AND DOCUMENTS OF FEDERAL OFFICIALS

1. *Disposition of Papers in the Custody of Senior Officials.* The practices of the Department of the Interior with respect to the treatment and disposition of papers in the custody of senior officials at the time they retire (or otherwise depart) from office are in accordance with the policy of the Department as expressed in Part 436, Chapter 1, of the Departmental Manual (Removal of Papers on Leaving Department — Removal of Official Records). This Chapter, in pertinent part, provides as follows:

> .1 *General.* Documentary materials which fall under the statutory definition of "records" may be disposed of only in accordance with the statute and applicable records control schedules. Records made in connection with the transaction of public business or pursuant to law belong to the Government, not to any individual officer or employee.
>
> .2 *Standards.* To implement the legal restrictions against the removal of records by any employee leaving the service of a Federal agency, the following standards will apply:
>
> A. Papers which are clearly personal may be removed. These include such items as office diaries, logs, workaids, etc. Such papers are to be plainly labelled "Personal" and filed separately from official records of the Department. In the case of papers containing both personal and official matter, extracts are to be prepared of the official portions for incorporation into the Department's records.
>
> B. Nonrecord materials may be removed, provided their withdrawal does not create such a gap in official files as to impede the proper documentation of Departmental activities.
>
> C. Extra copies of unclassified records may be removed provided:
>
> (1) There are no legal or policy objections to their removal.
>
> (2) They were produced by an outside agency which is agreeable to their removal.
>
> (3) Affirmative action is taken to insure that the record copy and sufficient nonrecord copies required for the efficient transaction of business are available in official files of the Department.

In our view, this Chapter provides a legally sound framework for the handling of records of departing employees. The Chapter appears consistent with the Cabinet Paper of July 27, 1959, which provided specific guidance for the handling of papers of senior officials. We feel that the Chapter is also consistent with the Federal Records Act, 44 U.S.C. 3301-3314. In our view, even the workpapers of Government officials are records subject to the Act. *See, Nixon v. Sampson,* 389 F.Supp. 107, 145 (D.D.C. 1975). Workpapers, notes, logs, workaids, and extra copies of official documents are ordinarily not subject to records disposal procedures, however, and may be disposed of at the discretion of each employee (41 CFR 101-11.401-4.) In view of this discretion to destroy such documents, it seems to us permissible for an employee to remove documents when he retires, subject to a review to assure that their removal will not create gaps in the official records of the Department.

The cited practice and policy explicitly provides for the retention of a complete record of agency business, along

with the Department's policies and practices in records maintenance and disposition. The need to protect the confidentiality of sensitive information is recognized and fully provided for in the Department's policy and procedure as stated in Part 442, Chapter 1, of the Departmental Manual (Security — Classification, Declassification and Safeguarding of National Security Information and Material). This security policy does not provide for the physical retention of classified national security information by any individual upon retirement or other termination from the Department. Upon departure, every official whose position required access to classified national security information is required to sign a Security Termination Statement, in the presence of a witness, certifying to awareness of a continuing responsibility for safeguarding the knowledge of classified information gained during the course of employment. An oral security debriefing is given in all cases when the terminating employee has had a special access authorization or had access to TOP SECRET information.

The Department's policy with respect to Government employees is to protect their personal privacy. The following policy is stated in Part 370, Chapter 293, of the Departmental Manual (Personnel — Personnel Records and Filed)

> "Personal information may be collected and/or maintained only if the information is relevant and necessary to perform officially required personnel management functions and is collected with the full knowledge of the employee."

The Department recognizes the need of former officials to have access to appropriate records after leaving office, subject to limitations described below. In general, "need-to-know" considerations govern the occasional instance when this happens. For example, former Under Secretary Whitaker has been afforded access to records since he left the Department. Also, the Southwestern Power Administration has honored a request that their former Administrator receive copies of a number of papers and records for deposit in the Harry S. Truman Library.

The public, and historians as a specialized part of the public, have rights to access appropriate agency records, especially under the Freedom of Information Act (see 4 below), but not confined to that Act. The Department's policy concerning treatment of requests for records from the public is expressed in 43 CFR 2.13 (Public Lands: Interior — Records and Testimony: (Subpart B: Inspection of Records) Records Available). Pertinent portions of this section provide:

> (a) *Department policy.* It is the policy of the Department of the Interior to make the records of the Department available to the public to the greatest extent possible, in keeping with the spirit of the Freedom of Information Act.
>
> * * *
>
> (d) *Decisions on requests.* It is the policy of the Department to withhold information falling within an exemption [from mandatory disclosure under the Act] only if (1) disclosure is prohibited by statute or Executive Order or (2) sound grounds exist for invocation of the exemption.

Finally, historical records of the Department are routinely transferred on a continuing basis to the National Archives, where they are appropriately accessible to the public and historians.

2. *Summary of Agency Regulations.* The Department's regulations concerning the practices and policies in 1 above are summarized or excerpted in the context of the substantive discussion above. The following is a listing of those cited. Copies are attached at the tab indicated for each.

Tab A. *436 DM 1.* Removal of Papers on Leaving Department — Removal of Official Records

Tab B. *442 DM 1.* Security — Classification, Declassification and Safeguarding of National Security Information and Material

Tab C. *370 DM 293.* Personnel — Personnel Records and Files

Tab D. *43 CFR 2.13.* Public Lands: Interior — Records and Testimony: (Subchapter B; Inspection of Records) Records Available

3. *Limitations on Access to Agency Records.* The Department prescribes no special limitations on access to agency records by former senior officials, present and former employees, and private citizens and organizations. Any limitations to such access are based on those cited in 1 above, and the Privacy and Freedom of Information Acts (see 4 below).

4. *Experience in Implementation of Freedom of Information and Privacy Acts.* We are unable to supply a specific figure on the volume of requests which the Department is now receiving under the Freedom of Information Act. Initial requests are handled on a decentralized basis by the 13 bureaus and more than 20 offices of the Department. In 1972, a survey of the Department was undertaken. This survey reported that between July 4, 1967, and July 4, 1971, the Department received 62,000 requests for records, exclusive of requests made to the Bureau of Land Management for copies of land records. During the period, the Bureau of Land Management received some 638,000 requests for land records. The 1974 Amendments to the Freedom of Information Act (which took effect in February 1975) have clearly produced an increase in requests for records which specifically rely on the Act. Evidence of this increase is found in the fact that the number of initial

denials of requests made under the Act rose from 26 in 1974 to 120 in 1975. The number of appeals from initial denials also grew, perhaps even more dramatically. In 1974, three appeals were decided; in 1975, 27 appeals were handled. Preliminary figures for 1976 suggest a continued upward trend in denials and appeals. During the first 7 months of calendar 1976, some 30 appeals were filed. We are doubtful, however, that the increase in the number of denials and appeals means that the total number of requests for records has risen spectacularly over the levels of 1967-1971. Most of the requests for records received during the 1967-1971 period did not specifically cite the Freedom of Information Act (although they may have technically been subject to treatment under the Act). We suspect that the volume of requests of this type has not been significantly affected by the 1974 Amendments and that such requests have experienced no more than a moderate growth in volume since 1971.

No signficiant organizational adjustments have been made by the Department to cope with the Freedom of Information Act. While the absence of a centralized mechanism for treating requests has potential disadvantages, a decentralized approach is the only feasible method for handling Freedom of Information Act requests in an agency as large and as far-flung as the Department of the Interior. This has been particularly true since the imposition, by the 1974 Amendments, of the 10-day time limit for processing initial requests under the Act. As to the cost of implementing the Freedom of Information Act, we are unaware of any records which would reflect the resources which the Department has had to commit to the Act.

As to the overall effect of the Freedom of Information Act on the Department of the Interior, we are of the view that the Act has not caused the major problems for the Department that it has for some agencies, such as the FBI. So far

as we are aware, the Act has not generally resulted in major diversions of resources to the processing of requests for records. The potential for such diversions does exist, however, as is shown by the experience of two small offices, the Office of Equal Opportunity and the Alaska Pipeline Office. Both offices have had to devote significant staff time to processing of Freedom of Information Act requests. In the case of the APO, this diversion of time from other duties has been caused by a small number of exceedingly persistent requestors.

A copy of the Department's 1975 annual report to the Congress on implementation of the Freedom of Information Act is attached at Tab E. The report provides additional background information on administration of the Act.

Implementation of the Privacy Act has not required any significant organizational adjustments, other than the designation of Department and Bureau Privacy Act Officers. However, the administrative burden of implementing the Act has been substantial. As reported to the Office of Management and Budget, the Department's start-up costs for implementation are estimated at about $600,000 for the period between January 1975 and September 1976. Operating costs for the year ending in September 1976 are estimated at nearly $200,000. These costs include such activities as publishing requirements, training, granting access, correcting records, security and control, accounting for disclosures, and new data collection procedures. The Department does not have current information on requests for access, but we do know that they have been relatively few, and that there has been only one appeal. The Department's regulations covering the Privacy Act (43 CFR 2, Subpart D) and its internal policy and procedure issuance (Part 317 of the Departmental Manual: Privacy Act Requirements) are attached at Tab F.

5. *Specific Problems Encountered.* The Department's problems with respect to the control, disposition, preservation, or definition of official records and documents primarily relate to the Freedom of Information and Privacy Acts. A description of some of these problems follows, as presented by the Bureau or office experiencing them.

a. *Office of Organization and Personnel Management.* One problem we have been experiencing of late is recurring requests from the same requesters on the same subject — almost as "badgering" technique. While we may send them our regulations on appeal procedures (if they do not like their answer), this does not prohibit additional inquiries. We of course can send basically the same response on each instance, but it does take up our time. We are unaware of any provisions for us to not answer requests under the Freedom of Information Act regardless of the reason (and would not want to for legitimate requests) but some provisions should be made for those who see the Federal Government as a "pen pal." In all probability we are not the only ones experiencing this problem.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(Caption omitted in printing)

SECOND AFFIDAVIT OF HENRY A. KISSINGER

HENRY A. KISSINGER, being duly sworn, deposes and says:

1. I am one of the defendants in the above-captioned actions. This affidavit is given in support of my Cross-Motion for Summary Judgment filed herein, and states facts within my own knowledge.

2. From January 20, 1969, until September 22, 1973, I served in the White House as Assistant to the President for National Security Affairs. From September 22, 1973, until November 3, 1975, I served both as Assistant to the President for National Security Affairs and as Secretary of State. After November 3, 1973, I continued to serve as Secretary of State until January 20, 1977.

3. During the period of my government service, my secretaries generally monitored my telephone conversations and took shorthand notes of what was said. These notes were later transcribed and filed in my personal files; the shorthand notes were not kept. My purpose in causing the notes to be made was to create a rough record of those of my daily telephone conversations to which I or my immediate staff might wish to refer in order to follow up on matters discussed orally. There was nothing unusual about this; many other high-level officials at the White House, the State Department, and other departments of the government have for decades followed the same practice of transcribing telephone conversations and filing them with their private papers.

4. In my case, the notes served as work aids to ease the administrative burdens of my office. For example, my executive secretary checked them periodically in order to prepare my appointments schedule and keep it current. The notes were also read by my Senior Special Assistant so that he could keep abreast of my activities. This saved time, as it enabled him to know whether any matters I had discussed required follow-up or implementation without waiting for me to report the substance of my telephone conversations. The notes had no other function, and were used for no other purposes.

5. The monitoring of my conversations was not limited to discussions of official business, but included most of my conversations without regard to their subject matter or the identity of the other party to the conversation. It was not practical to limit the monitoring to official conversations, because I would not always know the character of a conversation until after it had begun. Thus, the transcribed notes give details of my conversations with friends, journalists, diplomats, government officials, two Presidents, scholars, Congressmen, and other people. Many of these conversations were of a purely personal character; this is true of conversations with diplomats, Congressmen and other government officials as well as conversations with others. Other conversations were of a mixed character, in which discussions of personal and official matters were intermingled. Even formal business conversations would concontain humorous and other personal and non-official remarks.

6. I always regarded the telephone transcripts as work aids which I could retain or discard as I chose as had several of my predecessors and many other officials. They were not filed among the official records of any agency, but were stored along with the rest of my personal papers in personal files located in my office. The notes were not to my

knowledge circulated outside my office, and only I and my immediate personal staff had access to them. I did not edit the notes as they were made, or at any other time. There was no need to do so, because no one other than my immediate staff used them and they could obtain the limited information they needed from the rough notes themselves. Had I believed the telephone transcripts would be treated as official records, I would have been obliged to edit them as they were made in order to assure that the stenographers had understood correctly and that the notes were accurate and complete and in suitable form for filing as official records. Since this would have required a substantial commitment of my time, I probably would have decided the notes were not worth the effort, and thus would not have made them at all.

7. As the end of my term as Secretary of State drew near, I began to make plans for leaving public office. I believed that the papers relating to my years in government should be preserved, and decided to donate them to the United States. I chose the Library of Congress as the custodian of these papers, because I knew it had been used as a depository by many other Secretaries of State.

8. In making this donation, I wanted to include not only my personal papers, but also copies of official State Department records relating to my activities. I believed that such a collection of personal and official papers would provide a unique opportunity for future historians by assembling in one place all the papers relating to my years of association with government.

9. To accomplish this objective, it was necessary to obtain State Department approval to transfer my working files, which contained copies of official documents connected with my activities, to the Library. This approval was required because the State Department's policies do not permit a retiring official to retain copies of classified

documents unless it is satisfied that the documents will be stored in facilities suitable for the receipt of such materials. To satisfy this requirement, it was necessary to secure approval by the Department's Office of Security for the proposed storage facilities at the Library and to establish procedures for review of the working files to assure that they did not contain any original records which should have been filed in the Department's Central Files. The steps taken in meeting these requirements are described in a Donation Procedures Memorandum, dated November 12, 1976, a copy of which is attached hereto.

10. The procedures adopted in connection with transfer of my working files to the Library of Congress did not apply to my personal files, because Department of State regulations presume that papers which were designated and filed as personal from the date of origin or receipt may be removed by a retiring official without further processing. The telephone notes at issue here met this description, because they had originally been part of my personal files transferred from the White House to the State Department and had continued to be maintained in separate personal files during my years at the Department.

11. In addition, I had been advised by the Department's Legal Adviser, Monroe Leigh, that the telephone notes were not records of the State Department, but rather were my personal papers which I would be free to retain when I left office. He first gave me this advice in early 1976, and repeated it in a number of subsequent discussions. Mr. Leigh summarized the substance of that advice in a written memorandum, dated November 11, 1976, a copy of which is attached as Exhibit B to the complaint filed in No. 77-0220 herein.

12. In October 1976, I decided to remove the telephone notes from my office in the State Department. Since I had no suitable place of my own in which to store the notes, I

received permission from then Vice President Rockefeller to place them in a large bank-type vault at his estate in Pocantico Hills, New York. The removal and transfer occurred on October 29, 1976; it was arranged for me by Lawrence M. Eagleburger, at my request.

13. At about the same time, I asked Mr. Eagleburger to review the notes to determine whether extracts should be made of any portion of the notes for inclusion among the Department's official records. I chose Mr. Eagleburger because he had worked with me during most of the time I had been in government, was familiar with my activities, and therefore could identify the portions of the notes appropriate for extracting. My instructions to Mr. Eagleburger were that he should read all the telephone notes, including those from the White House period, and extract everything he believed was necessary in order to comply with the regulations and Mr. Leigh's advice. He subsequently reported to me that the extracts had been made and delivered to the Director of the Department of State Records Center and to the Staff Secretary of the National Security Council.

14. The agreement donating my State Department working files and personal papers from my years at Harvard University to the Library of Congress was executed on or about November 12, 1976. A copy of that agreement is attached as Exhibit A to the complaint filed in No. 77-0220 herein. In mid-December 1976, I decided that the telephone notes should also be part of the Library's collection. I executed a separate agreement relating to this donation on December 24, 1976. A copy of this agreement is attached as Exhibit C to the complaint filed in No. 77-0220 herein.

15. The notes were treated separately in a second agreement because I concluded that the access restrictions stated in the original agreement were not adequate to deal

with the special privacy problems presented by the notes. Many of the notes contained statements made in confidence which the speakers could reasonably assume would not be made public. Some of these statements might affect the reputations of prominent individuals still active in politics or foreign affairs. I believed there was a need to preserve the confidentiality of these conversations until sufficient time had passed to assure that they would be a part of history rather than of contemporary politics. Since it was necessary to protect not only my privacy, but the privacy of the persons with whom I spoke, I decided the second agreement should restrict access to these notes for the lives of *both* parties to the conversations.

16. At about the time the second agreement was signed, I asked Mr. Eagleburger to arrange for transfer of the notes from Pocantico Hills to the Library of Congress. I understand that this transfer was made on December 28, 1976.

17. Since this litigation began, I have had an opportunity to examine the notes. This limited inspection confirms my previous understanding that the notes are rough memoranda which vary considerably in quality according to the skill of the secretary who made them. Although some of the notes appear to be substantially verbatim, many others are only rough approximations of what was said. Quite a few of the notes I saw contained misspelled names, omissions, garbled passages, and outright errors of transcription. Although the notes are useful in refreshing my recollections of particular conversations in which I participated, I do not believe they could be regarded as accurate records of my conversations unless they were first corrected and placed in proper form for filing as records.

18. Future historians, who will have the opportunity of comparing the notes to official records after these records have been declassified, may find the notes useful. However,

I believe it would be highly inappropriate to release them now, when the full historical record of the period is still incomplete, and when many of the participants in the conversations are still active in public life.

/s/ Henry A. Kissinger
HENRY A. KISSINGER

[Jurat omitted in printing]

DEPARTMENT OF STATE

ACTION MEMORANDUM
S/S

November 12, 1976

LIMITED OFFICIAL USE

TO : The Secretary
FROM: M — Lawrence S. Eagleburger

Donation Procedures

Attached (Tab 1) is a proposed Deed of Gift and Agreement, which would be the legal instrument by which the collection of papers from your years in Government and from other periods of your life would be donated to the Library of Congress.

Paragraphs 2 and 3 of the proposed Deed of Gift and Agreement refer to Government review and approval of copies of Government papers that would be included in the collection. If you concur, papers will be reviewed in the Department of State in the following manner:

1. The Director of the Department of State Documents Center (FADRC) will designate up to three FADRC employees to review your Department of State files, which may include some personal papers which were not expressly designated or filed as personal from their time of origin or receipt. This is in accordance with Department regulations (5 FAM 417.1).

2. In reviewing these papers, the FADRC employees will crosscheck all Department documents in your files against the Central Foreign Policy File of the Department and those files retained in the Executive Secretariat, to ensure

that the central file is complete and that the Secretary's files do not include any original or record copies. If a Department record is found in your file that is not present in the central file, the FADRC employees will (a) make a duplicate of the paper, (b) place the duplicate in your files, and (c) take the necessary steps to include the document in the Department's record system. In some cases, certain documents may be temporarily retained in the Executive Secretariat rather than the Department's Central Foreign Policy File.

3. If the FADRC employees locate any paper which they consider to be personal or of a non-record nature, they will simply leave that paper in the file and take no action to include such items in the Department's central records. In the case of any document containing both personal and official matter, an extract of official contents will be prepared for inclusion in the Department's record system. In making determinations between personal, record, and non-record material, FADRC employees will be guided by the Director of FADRC, who will, as need arises, consult with one of your assistants and/or the Department's Legal Adviser in making a final decision. If you so desire, all documents or portions of documents duplicated for the central files can be so annotated on your copy.

4. After the Department's Document Center has completed its review of a file or group of files, it may be delivered to the Libarary of Congress under paragraph 3 of the Deed of Gift and Agreement at Tab 1.

5. Under the Department's regulations (5 FAM 417.1a), you are entitled to retain papers that have been expressly designated or filed as personal from their time of origin or receipt. In accordance with paragraph 3 of the Deed of Gift and Agreement, these personal papers may be transferred to the Library of Congress at any time within three months after the Deed of Gift and Agreement is signed.

6. The Department of State's Office of Security has completed an inspection of the storage facilities at the Library of Congress to be used for the storage of your collection of papers. It has been determined that they satisfy the requirements for storage of all classified or controlled information, provided the Library of Congress takes certain steps with respect to the storage area (see Tab 3). The Library of Congress has undertaken to complete these steps within the coming week. No copies of Government papers will be delivered to the Library until these steps are completed.

7. At the time you resign your position as Secretary of State and leave the Department, you will be required (under 5 FAM 417.2) to sign a Separation Statement, Form JF-3. A copy of the Statement you will be required to sign appears at Tab 2.

As noted below, the procedures discussed in this memorandum, as well as the provisions in the Deed of Gift and Agreement pertaining to the Department of State, have been approved by the Department officers concerned. If you concur, the procedures discussed in this memorandum will be implemented.

Recommendation:

That you concur in the procedures described in this memorandum.

Approve __ Disapprove_____

Attachments:

1. Proposed Deed of Gift and Agreement.

2. Copy of Separation Statement, Form JF-3.

3. Memorandum from the Office of Security concerning the storage area at the Library of Congress.

4. Excerpt of Department of State Regulations.

Clearances:

L—Monroe Leigh /s/ M.L.

A—John Thomas /s/ J.T.

A/O/FADRC—Jack Pruden /s/ J.P.

[Attachments 1 and 3 omitted in printing]

[Attachment 2]

STATE—AID—USIA
SEPARATION STATEMENT

I, Henry A. Kissinger, make the following statement in connection with my separation from employment in the Department of State, the United States Information Agency or the Agency for International Development. As used herein, the term "employment" includes all periods of assignment or detail, as well as any periods of temporary, part-time or intermittent employment therein, and the term "separation" includes suspension for any period in excess of 30 days, retirement from active duty, transfer to another agency, resignation, furlough to enter military service, etc. Subject to the Memorandum dated November 1976, entitled "Donation Procedures" —

1. I have surrendered to responsible officials all classified or administratively controlled documents and material with which I was charged or which I had in my possession, and I am not retaining in my possession, custody, or control, documents or material containing classified or administratively controlled information furnished to me during the course of such employment or developed as a consequence thereof, including any diaries, memorandums of conversations, or other documents of a personal nature that contain classified or administratively controlled information.

2. I have surrendered to responsible officials all unclassified documents and papers relating to the official business of the Government acquired by me while in the employ of the Department, USIA or AID.

3. I shall not publish, nor reveal to any person, any classified or administratively controlled information of which I have knowledge, or any other information transmitted to me in confidence in the course of my official duties, except as may be authorized by officials of the employing Department or Agency empowered to grant per-

mission for such disclosure.

4. I have been advised by the interviewing officer whose name appears below and understand the criminal penalties relating to U.S. Government records and information and the use thereof:

Title 18, U.S. Code

Section 641 — Public Money, Property or Records
793 — Gathering, Transmitting or Losing Defense Information
794 — Gathering or Delivering Defense Information to Aid Foreign Govt.
798 — Disclosure of Classified Information
952 — Diplomatic Codes and Correspondence
1905 — Disclosure of Confidential Information
2071 — Concealment, Removal, or Mutilation of Records

Title 50, U.S. Code

Section 783(b) — Communication of Classified Information by Government Officer or Employee
783(d) — Penalties for Violation

Title 42, U.S. Code

Section 2272 — Violation of Specific Sections
2273 — Violation of General Sections
2274 — Communication of Restricted Data
2275 — Receipt of Restricted Data
2276 — Tampering With Restricted Data
2277 — Disclosure of Restricted Data

5. I have been advised by the interviewing officer whose signature appears below and fully understand that Section 1001 of Title 18, United States Code, provides criminal penalties for knowingly and willfully falsifying or concealing a material fact in a statement or document submitted to any department or agency of the United States Government concerning a matter under its jurisdiction.

(Signature of Interviewing Officer)	*(Signature in Presence of Interviewing Officer)*
(Date)	*(Date)*
(Typed Name of Interviewing Officer)	*(Typed Name of Employee)*
(Post, Department or Agency)	*(Other Names Used During This Period of Employment)*

FORM JF-3 (Formerly DS-1055)
7-67

GPO: 1967 O - 305-210(23)

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, *et al.*, Plaintiffs,	)	
v.	)	Civil No. 77-0220
CYRUS R. VANCE, *et al.*, Defendants.	)	

AFFIDAVIT OF MONROE LEIGH

DISTRICT OF COLUMBIA: SS

MONROE LEIGH, being duly sworn, deposes and says:

1. I am a partner in the law firm of Steptoe & Johnson. From January 21, 1975, to January 20, 1977, I was Legal Adviser of the Department of State. This affidavit is given in connection with the above-captioned action, and states facts within my own knowledge.

2. Exhibit B to the amended complaint filed herein is a memorandum, dated November 11, 1976, addressed by me, as Legal Adviser of the Department of State, to Dr. Kissinger, who then was Secretary of State. This memorandum summarizes oral advice previously given to Dr. Kissinger relating to the transcribed notes of his telephone conversations which are at issue in this litigation. My general conclusion, as set forth in the memorandum, was that the notes were not agency records of the Department of State, but rather were Dr. Kissinger's personal papers

which he would be free to retain when he left office.

3. The initial occasion for that advice was a Freedom of Information Act request, filed by William Safire in January 1976 and is attached to the amended complaint as Exhibit F. Mr. Safire's request demanded access to transcriptions of Dr. Kissinger's conversations in which Mr. Safire's name was mentioned, and to transcriptions of conversations between Dr. Kissinger and certain named individuals in which the subject of "leaks" was discussed.

4. It was my opinion that Mr. Safire's request should be denied because the notes were not "agency records" of the Department of State which would be subject to the Freedom of Information Act. In connection with my decision in this matter, I reviewed those transcribed notes which might have been considered within the scope of Mr. Safire's request. I also submitted the same notes to the Department of State's Council on Classification Policy, and was advised that they did not contain any classified materials. This decision of the Council on Classification Policy should not, however, be construed as a conclusion that *none* of the notes contained classified material, because the only notes submitted to the Council for review were those within the scope of Mr. Safire's request.

5. To the best of my recollection, I first orally advised Dr. Kissinger of my opinion that the notes of his telephone conversations were not agency records of the Department of State, but rather were his personal papers, at some time prior to the ruling on Mr. Safire's Freedom of Information Act request. I am certain that I repeated this advice on a number of subsequent occasions during the course of the next eleven months. I also suggested that he should, in view of the Department's regulations, and as a precaution, arrange for a review of the notes to determine whether they contain any significant policy decisions or actions not otherwise reflected in the Department's records and, if so, that extracts of these matters be made and submitted to the

appropriate agency records officer for filing. I do not recall precisely when this suggestion was made, but I believe that it was made before October 1976.

6. Near the end of Dr. Kissinger's term of office, I participated in the planning of his donation of personal and other papers to the Library of Congress. In connection with these plans, I reviewed and approved a Donation Procedures Memorandum, dated November 11, 1976. A copy of this memorandum is attached to the Affidavit of Henry A. Kissinger filed herein. This memorandum was also reviewed and approved by Lawrence M. Eagleburger, the Deputy Undersecretary for Management; by John Thomas, the Assistant Secretary for Administration; and by John Pruden, the Director of the Department of State Documents Center.

7. Paragraph 5 of the Donation Procedures Memorandum states that Dr. Kissinger would be entitled to retain papers that had been expressly designated or filed as personal from their date of origin or receipt, and that these personal papers could be transferred to the Library of Congress in accordance with his plans. Although this paragraph does not specifically mention the transcribed notes of Dr. Kissinger's telephone conversations, I and all of the other persons who signed the memorandum were aware of the fact that these notes were filed among Dr. Kissinger's personal files.

/s/ Monroe Leigh

Monroe Leigh

[Jurat omitted in printing]

Donation of Personal Papers to the Richard Nixon Library

The preservation of the papers and other historical materials of the President of the United States, together with the papers of his associates and contemporaries, is authorized by the Presidential Libraries Act of 1955. Under this act, Presidential libraries have been established for Presidents beginning with Herbert Hoover.

President Nixon has indicated his intention to deposit his papers in a future Richard Nixon Library. It will be administered, like the six operating Presidential libraries, by the General Services Administration through its National Archives and Records Service. Adding the personal papers of the men and women who helped President Nixon shape national policies will give perspective and accuracy to the study and understanding of his administration. To this end, the President has asked Cabinet officers, heads of Government agencies, and key officials under them to deposit their personal papers in the National Archives for the Richard Nixon Library.

In a Presidential library, the papers of an individual, like the papers of the President, are kept intact as separate, named collections. They are in the care of a professional staff of archivists who can give intelligent guidance to those who may wish to use them in the future and provide reference on them as needed by the donor. Donors may place restrictions and conditions on the use of the papers when they execute a deed of gift.

Personal papers of a Government official are the files he has organized and maintained for his own personal use, but they must be distinguished from official records. Federal law defines official records as those preserved by an agency, or appropriate for preservation by an agency, as "evidence of the organization, function, policies, decisions,

procedures, operations, or other activities of Government or because of the informational value of data in them" (44 USC 3300). The law requires that certain procedures be followed for the preservation or disposal of official records; they may be disposed of only with the approval of the Administrator of General Services.

Subject to these criteria, personal papers may include all or some of the following:

1. Personal correspondence of the official that does not directly concern the work of his office and that is not intended to be a part of the official records of the office. The correspondence may be with friends, family members, professional or business associates, or other administration officials. It may relate to purely personal interests or to national and State affairs, Government appointments, political campaigns, or other topics. Material on subjects in controversy or on personally sensitive matters may be protected by the terms of the deed of gift.

2 Working drafts and notes, used and unused; notebooks.

3. Appointment calendars; logs of telephone calls.

4. Speeches, extra copies; drafts of speeches; related correspondence.

5. Journals, diaries, scrapbooks, and press clippings.

6. Press releases issued by the office, extra copies.

7. Directories or lists of persons and positions in the office.

8. Personal photographs, motion pictures, and sound recordings.

A Government official customarily accumulates extra copies of Government documents for convenience of

reference. Many of these are papers that he has drafted, reviewed, or otherwise taken action on. They are evidence of his contribution to the agency and its programs. The official may retain such papers, provided that they are eligible for disposition under Federal law as extra copies (44 USC 3301), and also provided that the agency records officer raises no objection to their designation as such. Materials classified under Executive Order 11652 and those defined as "Restricted Data" under the Atomic Energy Act of 1954 must be handled in accordance with the provisions of the Executive order and of the 1954 act, respectively.

Physical objects belonging to the individual that have an association with the President or with the individual's Government service may also be part of an official's personal collection of historical materials.

In donating papers and other historical materials to a Presidential library, officials are reminded that the library contains papers covering the entire career of the President. It is therefore hoped that individuals will donate papers covering their entire careers. The more complete the material, the more dependable it is as historical evidence and the more useful to future historians, biographers, and other researchers.

The great value of personal papers is that when they can be released for scholarly research — a matter for the donor to decide — they provide background information on people, politics, and public issues not to be found in official Government records. For the biographer, they may also contain indispensable information on an individual's civic and business affairs and his family life. When studied in conjunction with official records, personal papers help document the special knowledge, abilities, interests, and characteristics of the men and women who comprise the highest level of Government. A Presidential library will hold all of this source material in trust, confident that both

the Nation and the individual will benefit from the fullest possible documentation of this era.

National Archives and Records Service
General Services Administration
Washington, DC 20408

November 1972

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS Plaintiff	)	
vs	)	C.A. 77-220
VANCE AND KISSINGER Defendants	)	
MILITARY AUDIT PROJECT Plaintiff	)	
vs	)	C.A. 77-391
VANCE AND KISSINGER Defendants	)	

Washington, D.C.
September 28, 1977

The above entitled matter came on for hearing before THE HONORABLE JOHN LEWIS SMITH, JR., United States District Judge, at 11:00 a.m.

APPEARANCES:

ROBERT SUSSMAN, ESQ.
WILLIAM A. DOBROVIR, ESQ.
Attorneys for Plaintiffs

DAVID GINSBURG, ESQ.
Attorney for
Dr. Henry A. Kissinger

MS. BARBARA WARD
Attorney for Government-
Defendants

JOAN CURTIS BLAIR, CSR
OFFICIAL COURT REPORTER

[pp. 57-58]
Secretary of State, Henry A. Kissinger, when he was Secretary of State, with anyone — which the Department states, those records do, indeed, save for the records which have been transferred to the Library of Congress, the records do indeed repose in the files of the Department of State.

The objectio. made by the Department in this letter was that our request was over-broad. Our motion for summary judgment refers not only to the materials that are presently reposing in the Library of Congress, but also to materials that are reposing in the Department of State, and we have pointed out in our motion papers that the Department's claim cannot pass muster under the amendments of 1974 to the Act which simply refer to identifiable records — the request does reasonably descrfibe the records as stated in the Irons case in the District of Columbia Circuit, which we cited in our memorandum.

We pointed out that these records of the Secretary's conversations are obviously located in a single place. There is no claim to the contrary.

The Government —

THE COURT: Is there any distinction, in your opinion, between the notes made at the White House and those made in the Department of State?

MR. DOBROVIR: Yes. I am afraid I would have to agree that there is a distinction.

THE COURT: You would?

MR. DOBROVIR: And we have claimed only those files and records which are Department of State records. There is another wholly separate problem with respect to the records of Dr. Kissinger, as National Security Adviser. Those records, and I think that this is a matter of controversy which I am shocked that the Government has not yet raised — but those records are squarely covered by the Presidential Materials Act, which the Supreme Court has

upheld, and the Administrator of General Services is under a mandate, by that statute, to reduce to his posession, all materials covered by that statute.

Since, if these materials are in the Library of Congress, he is in a position to reduce them to his posession — regulations with respect to them have not been issued, and I trust that, in pursuance of his public trust and obligation under the statute, the Administrator will make efforts to obtain possession of these documents.

It may be that the secret proceedings which are

[ORIGINAL ENDS AS ABOVE]

[EXHIBIT A]

UNITED STATES GOVERNMENT MANUAL
1975/1976
REVISED MAY 1, 1975

NATIONAL SECURITY COUNCIL

Executive Office Building, Washington, D.C. 20506
Phone, 202-395-3000

MEMBERS

The President . . . . . Gerald R. Ford
The Vice President . . . . . Nelson A. Rockefeller
Secretary of State . . . . . Henry A. Kissinger
Secretary of Defense . . . . . James R. Schlesinger

OFFICIALS

Assistant to the President . . . . . Henry A. Kissinger
Staff Secretary . . . . . Jeanne W. Davis

The National Security Council was established by the National Security Act of 1947 (61 Stat. 496; 50 U.S.C. 402), amended by the National Security Act Amendments of 1949 (63 Stat. 579; 50 U.S.C. 401 et seq.). Its function is to advise the President with respect to the integration of domestic, foreign, and military policies relating to the national security.

The Council is composed of the President, the Vice President, the Secretary of State, and the Secretary of Defense. The Council is located within the Executive Office of the President.

The Council considers policies on matters of common interest to the departments and agencies of the Government concerned with the national security and makes recommendations to the President.

For further information, contact the Staff Secretary, National Security Council, Executive Office Building, Washington, D.C. 20506. Phone, 202-395-3440.

Approved.

Jeanne W. Davis,
Staff Secretary.

UNITED STATES GOVERNMENT MANUAL
1973/74
Revised July 1973
(Revised Annually)

NATIONAL SECURITY COUNCIL

Executive Office Building, Washington D.C. 20506
Phone, 202-395-3000

MEMBERS

The President ..... Richard M. Nixon.
The Vice President ..... Spiro T. Agnew.
Secretary of State ..... William P. Rogers.
Secretary of Defense ..... James R. Schlesinger.

OFFICIALS

Assistant to the President
for National Security Affairs .... Dr. Henry A. Kissinger.
Staff Secretary ..... Jeanne W. Davis.

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For further information, contact the Staff Secretary, National Security Council, Executive Office Building, Washington, D.C. 20506. Phone, 202-395-3440.

Approved.

Jeanne W. Davis,
Staff Secretary.

UNITED STATES GOVERNMENT
ORGANIZATION MANUAL
1972/73

Office of the Federal Register
National Archives and Records Service
General Services Administration

Revised July 1972
(Revised Annually)

NATIONAL SECURITY COUNCIL

Executive Office Building,
Washington, D.C. 20506.
Phone, 202-395-3000

MEMBERS

The President . . . . . Richard M. Nixon.
The Vice President . . . . . Spiro T. Agnew.
Secretary of State . . . . . William P. Rogers.
Secretary of Defense . . . . . Melvin R. Laird.
Director, Office of
Emergency Preparedness . . . . . George A. Lincoln.

OFFICIALS

Assistant to the President for National
Security Affairs . . . . . Dr. Henry A. Kissinger.
Staff Secretary . . . . . Jeanne W. Davis.

CREATION AND PURPOSE. — The National Security Council was established by the National Security Act of 1947 (61 Stat. 496; 50 U.S.C. 402), amended by the National Security Act Amendments of 1949 (63 . . . .

UNITED STATES GOVERNMENT
ORGANIZATION MANUAL 1971/72

Revised July 1, 1971
(Revised Annually)

NATIONAL SECURITY COUNCIL

Executive Office Building,
Washington, D.C. 20506.
Phone, 202-395-3000

MEMBERS

The President . . . . . Richard M. Nixon
The Vice President . . . . . Spiro T. Agnew
Secretary of State . . . . . William P. Rogers.
Secretary of Defense . . . . . Melvin R. Laird.
Director, Office of Emergency
Preparedness . . . . . George A. Lincoln.

OFFICIALS

Assistant to the President for National
Security Affairs . . . . . Dr. Henry A. Kissinger.
Staff Secretary . . . . . Jeanne W. Davis.

CREATION AND PURPOSE. — The National Security Council was established by the National Security Act of 1947 (61 Stat. 496; 50 U.S.C. 402), amended by the National Security Act Amendments of 1919 (63 Stat. 579; 50 U.S.C. 401 et seq.). Its function is to advise the President . . . .

UNITED STATES GOVERNMENT
ORGANIZATION MANUAL — 1970/71

Revised July 1, 1970 (Revised annually)

NATIONAL SECURITY COUNCIL

Executive Office Building,
Washington, D.C. 20506.
Phone, 395-3000

MEMBERS

The President ..... Richard M. Nixon
The Vice President ..... Spiro T. Agnew.
Secretary of State ..... William P. Rogers.
Secretary of Defense ..... Melvin R. Laird.
Director, Office of Emergency
Preparedness ..... George A. Lincoln.

OFFICIALS

Assistant to the President for National
Security Affairs ..... Dr. Henry A. Kissinger.
Staff Secretary ..... William Watts.

CREATION AND PURPOSE.— The National Security Council was established by the National Security Act of 1947 (61 Stat. 496; 50 U.S.C. 402), amended by the National Security Act Amendments of 1949 (63 Stat. 579; 50 U.S.C. 401 et seq.). Its function is to advise the President with respect to the integration of domestic, foreign, and military policies relating to the national security.

ORGANIZATION. — The Council is composed of the President, the Vice President, the Secretary of State, the Secretary of Defense, and the Director of the Office of Emergency Preparedness.

The Council is located within the Executive Office of the President. Its staff is headed by a civilian executive

secretary, appointed by the President.

ACTIVITIES.— The Council considers policies on matters of common interest to the departments and agencies of the Government concerned with the national security and makes recommendations to the President.

For further information, contact the Staff Secretary, Executive Office Building, Washington, D.C. 20506. Phone, 395-3440.

Approved.

William Watts,
Staff Secretary.

UNITED STATES GOVERNMENT ORGANIZATION MANUAL 1969 - 70

Revised July 1, 1969

NATIONAL SECURITY COUNCIL

Executive Office Building,
Washington, D.C. 20506.
Phone, 395-3000

MEMBERS

The President ..... Richard M. Nixon
The Vice President ..... Spiro T. Agnew.
Secretary of State ..... William P. Rogers.
Secretary of Defense ..... Melvin R. Laird.
Director, Office of Emergency
Preparedness ..... George A. Lincoln.

OFFICIALS

Assistant to the President for National
Security Affairs ..... Henry A. Kissinger.
Staff Secretary ..... Richard M. Moose.

CREATION AND PURPOSE.— The National Security Council was established by the National Security Act of 1947 (61 Stat. 496; 50 U.S.C. 402), amended by the National Security Act Amendments of 1949 (63 Stat. 579; 50 U.S.C. 401 et seq.). Its function is to advise the President with respect to the integration of domestic, foreign, and military policies relating to the national security.

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For further information, contact the Staff Secretary, Executive Office Building, Washington, D.C. 20506. Phone, 395-3440.

Approved.

Richard M. Moose,
Staff Secretary.

ORGANIZATION

Assistant to the President for National Security Affairs
and
National Security Council Staff
1977

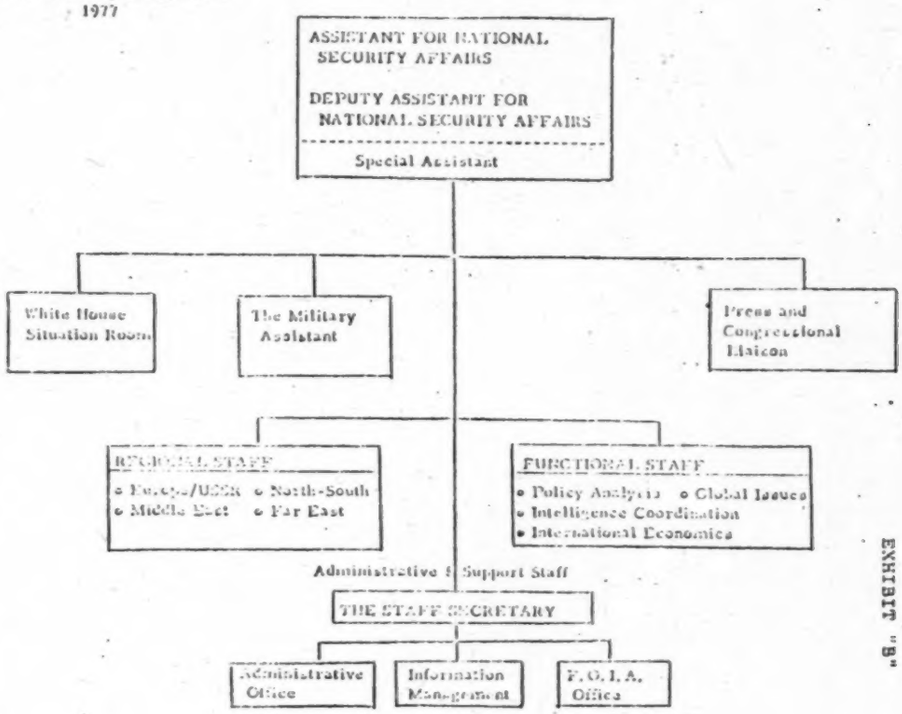

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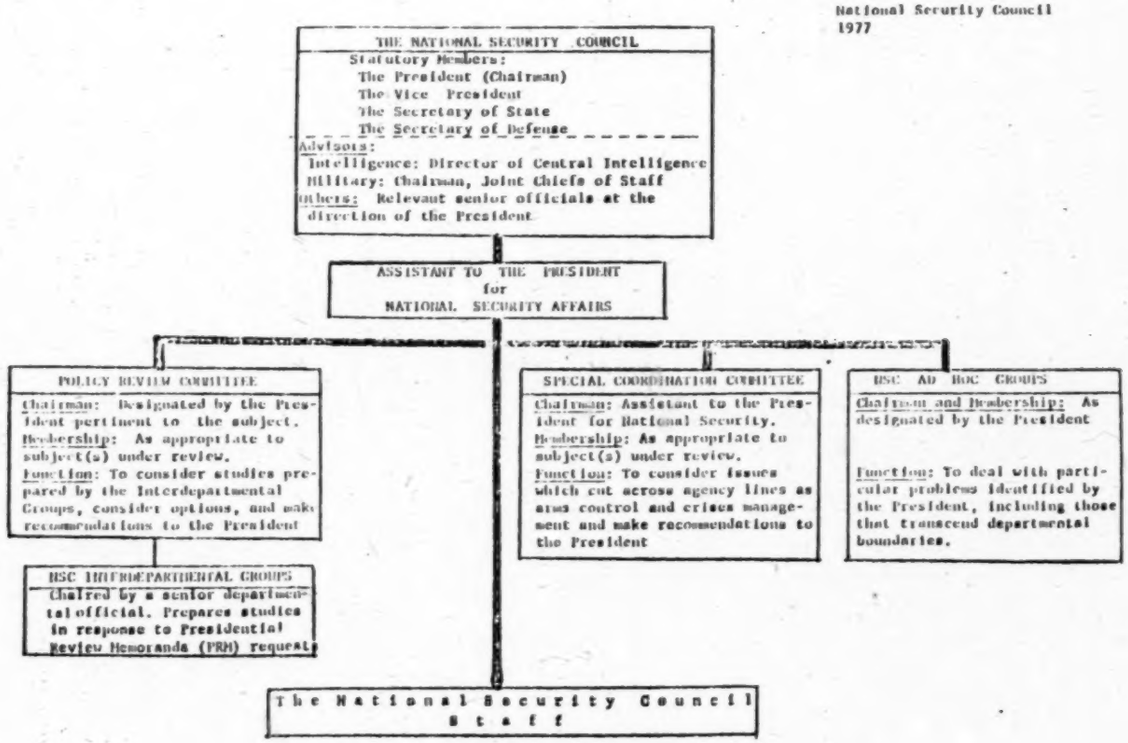
EXHIBIT "B"

ORGANIZATION & FUNCTIONS

National Security Council
1977



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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, et al., Plaintiffs,	)	
v.	)	Civil No. 77-0220
CYRUS R. VANCE, et al., Defendants.	)	

MILITARY AUDIT PROJECT, et al., Plaintiffs,	)	
v.	)	Civil No. 77-0391
DEPARTMENT OF STATE, et al., Defendants.	)	

AFFIDAVIT OF WILLIAM E. LEUCHTENBURG

CITY OF NEW YORK)
STATE OF NEW YORK) ss

I, William E. Leuchtenburg, being duly sworn, depose and say:

1. I am a plaintiff in this action, a member of the American Historical Association, also a plaintiff in this action, and DeWitt Clinton Professor of American History at Columbia University. I have been involved in research in the Presidential Archives at the Franklin D. Roosevelt, Harry S. Truman, John F. Kennedy, and Lyndon B. Johnson Libraries, and have written several books and articles on the American Presidency.

2. Under a contract with Oxford University Press, I am now writing the final volume of the *Oxford History of the United States*, which will concern the period 1945 to the present and embrace both the Nixon and Ford Administrations. I expect that this volume will be 200,000 words in length and will examine the events of the last two Administrations in extremely great detail.

3. I also have a contract with the Oxford University Press for a major revision of *The Growth of the American Republic*, which will be updated to cover the Nixon and Ford Administrations. I am scheduled to complete this revision within the next several months.

4. I am also the author of *A Troubled Feast*, published by Little, Brown & Co., which covers the first term of the Nixon Presidency. I am now under contract to update this book to cover the second term of the Nixon Presidency and the Ford Presidency. My revised version of the book is due to be delivered to Little, Brown in June of this year.

5. In order to meet these contractual and scholarly commitments, it is extremely desirable that I have timely access to the transcribed secretarial notes of Mr. Henry A. Kissinger's official telephone conversations as Secretary of State that are the subject of the Court's order of January 24, 1978. These notes represent a first-hand source of information about the Nixon and Ford Administrations that is invaluable. Without the notes, my ability to analyze the development and implementation of American foreign policy during the last eight years will be seriously impaired. I will be at a particularly great disadvantage in attempting to

write the final volume of the *Oxford History of the United States*, which will recount the government activities in which Mr. Kissinger participated in extremely great detail and therefore could benefit considerably from the daily account of important events and decisions that the notes of Mr. Kissinger's conversations will provide.

6. Because I am now at work on all three books, it would be a serious setback if I could not obtain access to the notes for another eighteen months to two years while an appeal in this case is pending. During this period, I expect to either finish or make substantial progress on each book. Accordingly, access to the notes will either come too late to be reflected in my final product or will require substantial rewriting and revision, with a resulting waste of time and effort.

7. It will be extremely unfortunate if Mr. Kissinger is able to use the notes of his official conversations for his own scholarly and commercial purposes while I am denied access to them. Mr. Kissinger's memoirs, articles and television appearances will have an important advantage over my own publications because they are based on a major historical source which I was unable to consult. In addition, the exclusive availability of these materials to Mr. Kissinger will make it difficult for historians such as myself to challenge his version of his actions during the Nixon and Ford Administrations and, thus, to provide the American public with an even-handed and balanced analysis of the last eight years. Accordingly, I believe that the continued unavailability of the notes during an appeal of this case will have a serious adverse effect on all informed members of the public.

/s/ William E. Leuchtenburg
William E. Leuchtenburg

[Jurat omitted in printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, et al., Plaintiffs, v. CYRUS R. VANCE, et al., Defendants.	)	Civil No. 77-0220

MILITARY AUDIT PROJECT, et al., Plaintiffs, v. DEPARTMENT OF STATE, et al., Defendants.	)	Civil No. 77-0391

AFFIDAVIT OF DR. MACK THOMPSON

CITY OF WASHINGTON)
DISTRICT OF COLUMBIA) ss

I, Mack Thompson, being duly sworn, depose and say:

1. Since 1974, I have served as Executive Director of the American Historical Association (A.H.A.), a plaintiff in this

action. The A.H.A. is the principal spokesman for professional historians in this country. It was chartered by the Congress in 1889 for the purpose of the "promotion of historical studies, the collection of historical manuscripts, and for kindred purposes in the interest of American history". The constitution of the A.H.A. reflects the Association's commitment to insuring the fullest availability of historical sources to scholars and students of American history. Under that constitution, a major activity of the Association is to "encourage the collection and preservation of historical documents and insure equal access to information." In order to further these purposes, the A.H.A. became a plaintiff in this lawsuit.

2. As Executive Director of the A.H.A. and a historian of American history of twenty years standing, I am intimately familiar with the activities, needs and concerns of students and scholars of American history in this country. Based on my background and experience, it is clear to me that the notes of Mr. Henry Kissinger's official telephone conversations as Secretary of State constitute first-hand source material that is invaluable for any historian interested in recent American history. If these notes continue to be unavailable for a period of one-to-two years while an appeal in this case is pending, the many undergraduates, graduate students and professional scholars who are studying, conducting research on, or writing about the Nixon and Ford Administrations will sustain serious harm. Without access to the notes, there is a real risk that efforts to understand these Administrations will be thwarted significantly.

3. In order to document the serious consequences of postponing access to the notes while an appeal of this case is pending, I contacted the following three prominent historians, each of whom confirmed that the continued unavailability of the notes would represent a considerable scholarly disadvantage:

(a) Frank Freidel is Charles Warren Professor of

American History at Harvard University. In addition to his other publications, Professor Freidel is the author of *America in the Twentieth Century*, (4th Ed. 1976), published by Random House. Professor Freidel is under contract to update this book and will probably commence this project shortly. Without access to the notes, he believes that he will lose the opportunity to draw on a valuable and illuminating set of source materials concerning foreign and domestic policy during the Nixon and Ford Administrations. Since *America in the Twentieth Century* is a standard text used by students at many levels, Professor Freidel's inability to use the notes may very well impair the efforts of teachers to describe and analyze the events of the last eight years.

(b) Arthur Link is Edwards Professor of American History at Princeton University. He has authored many books on American politics in the twentieth century and is especially known for his interest in Woodrow Wilson and William Jennings Bryan. Professor Link is a co-author of *American Epoch: A History of the United States Since 1900* (1974). Like Professor Freidel, Professor Link will be revising this book in the near future to reflect the impact of the Ford and Nixon Administrations. He believes that this task will be substantially impaired if the day-by-day account of these Administrations provided by the notes of Mr. Kisinger's conversations is unavailable to him. Since his book, too, is widely used by students, his lack of access to the notes will also have an adverse effect on the teaching of American history.

(c) James T. Patterson is Professor of History at Brown University. He is the author of *America in the Twentieth Century: A History* (1976). Like Professors Freidel and Link, he will shortly begin a revision of this book. In his view, the unavailability of a historical source as important and illuminating as the notes will have a serious adverse im-

pact on the quality of this project. His book, too, is a basic text widely used by students at all levels.

4. It would great compound the injury sustained by these and other scholars if Mr. Kissinger has the opportunity to use these notes for scholarly and commercial purposes of his own while professional historians are denied access to them. Mr. Kissinger's publication of books or articles based on this highly reliable and authentic source of information which is unavailable to others will make the efforts of historians less valuable, financially and intellectually. In addition, the exclusive availability of the notes to Mr. Kissinger will enable him to present a portrayal of his actions during the Nixon and Ford Administrations that historians will find it difficult to challenge. As a result, the historical profession will find it difficult tu fulfill its responsibility of providing the American public with an even-handed and balanced analysis of the last two Administrations.

/s/ Mack Thompson
Dr. Mack Thompson

[Jurat omitted in printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, et al., Plaintiffs,	)	
v.	)	Civil No. 77-0220
CYRUS R. VANCE, et al., Defendants.	)	

MILITARY AUDIT PROJECT, et al., Plaintiffs,	)	
v.	)	Civil No. 77-0391
DEPARTMENT OF STATE, et al., Defendants.	)	

AFFIDAVIT OF EVRON M. KIRKPATRICK

CITY OF WASHINGTON)
DISTRICT OF COLUMBIA) ss

I, Evron M. Kirkpatrick, depose and say:

1. For the last twenty-four years, I have served as Executive Director of the American Political Science

Association (A.P.S.A.), a plaintiff in this action. The A.P.S.A. was founded in 1903 and, since that time, has functioned as the principal representative of political scientists in this country. The Association is non-partisan and educational in orientation and currently has 12,000 members, all of whom have some background and professional interest in political science. Among its goals, the Association is committed to insuring open access to research materials that are of value to students of American politics and foreign relations. It was to further this purpose that the Association became a plaintiff in this lawsuit.

2. As the Association's Executive Director and a trained political scientist with both research and teaching experience, I am knowledgeable about the pursuits, interests and concerns of political scientists in this country. It is my judgment that the notes of Mr. Henry Kissinger's official telephone conversations as Secretary of State would, if available, provide extremely valuable source material for all political scientists interested in international affairs or American politics. If these notes continue to be unavailable for a further extended period during the pendency of an appeal in this case, the many political scientists who are interested in these subjects will sustain serious harm.

3. In order to determine the impact on political scientists of postponing access to the notes during an appeal of this case, the Association contacted the following prominent political scientists, each of whom advised us that the continued unavailability of the notes would place them at a significant scholarly disadvantage:

(a) Bernard Cohen is Professor of Political Science at the University of Wisconsin in Madison. Professor Cohen is the author of several books on public opinion and foreign policy, including the *Press & Foreign Policy* (1963), the *Political Process and Foreign Policy* (1957), *Citizen Education in World Affairs* (1953) and

Foreign Policy in American Government (1965). Without access to the notes, Professor Cohen believes he will be at a serious disadvantage in conducting research on, and writing and teaching about, American foreign policy and public opinion during the Nixon and Ford Administrations.

(b) Robert Axelrod is Professor of Political Science at the University of Michigan. Among his areas of specialization is foreign and military policy and he is the author of several books and articles on this subject. Professor Axelrod believes that his teaching, research and writing activities in the area of foreign affairs will be impeded without access to the notes.

(c) H. Bradford Westerfield is Professor of Political Science at Yale University. His principal areas of interest are international politics and foreign and military policy. He has written several books and articles on these subjects, many of which concern various aspects of national security and foreign policy during the Nixon and Ford Administrations. Professor Westerfield will be at a serious disadvantage in teaching and writing about these matters if he is denied access to the notes of Mr. Kissinger's conversations for an extended additional period.

4. It would greatly compound the injury sustained by these and other scholars if Mr. Kissinger has the opportunity to use these notes for scholarly and commercial purposes of his own while professional political scientists are denied access to them. Mr. Kissinger's publication of books or articles based on this highly reliable and authentic source of information which is unavailable to others will make the efforts of political scientists less valuable, financially and intellectually. In addition, the exclusive

availability of the notes to Mr. Kissinger will enable him to present a portrayal of his actions during the Nixon and Ford Administrations that political scientists will find it difficult to challenge. As a result, the political science profession will find it difficult to fulfill its responsibility of providing the American public with an even-handed and balanced analysis of the last two Administrations.

/s/ Evron M. Kirkpatrick
Evron M. Kirkpatrick

[Jurat omitted in printing]